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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1930

No. 261

STANDARD MARINE INSURANCE COMPANY, LTD.,
PETITIONER,

vs.

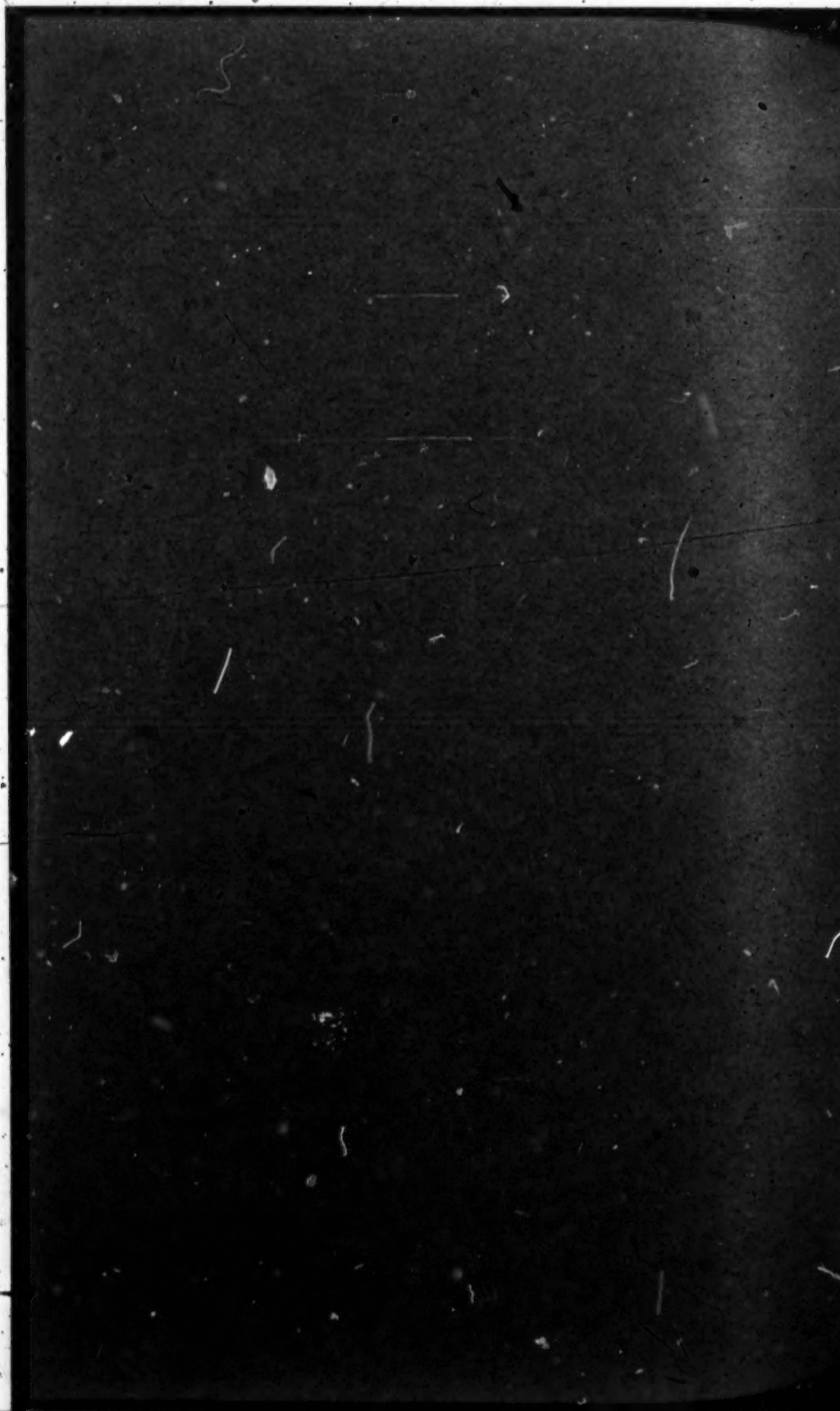
SCOTTISH METROPOLITAN ASSURANCE
COMPANY, LTD.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI FILED JULY 7, 1930

CERTIORARI GRANTED OCTOBER 13, 1930

(35,183)



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IN UNITED STATES DISTRICT COURT

No. 2965. Admiralty

In the Matter of the Petition of the COLUMBIA STEAMSHIP Company for Limitation of Liability as Owner of the Steamer "Leonard B. Miller."

[fol. 2] LIBEL AND PETITION FOR LIMITATION OF LIABILITY—Filed Jan. 6, 1925

To the Honorable David C. Westenhaver and Paul Jones, Judges of the District Court of the United States for said District:

The libel and petition of The Columbia Steamship Company, a corporation of the State of Ohio and owner of the Steamer "Leonard B. Miller," her engines, boilers, machinery, boats, tackle, apparel and furniture, in a cause of limitation of liability, civil and maritime, alleges and propounds as follows:

1. Libellant is a corporation duly created and existing under and by virtue of the laws of the State of Ohio, having its principal office and residence within said District and is, and was at the times hereinafter mentioned, sole owner of the Steamer Leonard B. Miller, hailing from Fairport, Ohio, which steamer is now within said District, at Toledo, undergoing repairs of the damage sustained in the collision hereinafter mentioned.

2. That on the 28th day of October, 1924, said Steamer Leonard B. Miller left the port of Huron, Ohio, bound thence to the port of Duluth, Minnesota, laden with a cargo of about 9,800 tons of soft coal; that at the time of leaving Huron and at all times hereinafter mentioned, said steamer was tight, staunch, strong and seaworthy in every respect and was fully equipped and manned with a full complement of competent officers and crew properly stationed and attentive to their duties for the safe navigation of said steamer; that while in the prosecution of said voyage, that is to say, on October 29th, 1924, at 2:00 o'clock P. M., while

on Lake Huron below Harbor Beach, she was in collision with the Steamer "Glenorchy," downbound, loaded with a cargo of wheat, under the following circumstances, which your petitioner avers to be true on information and belief:

That while proceeding on the usual, customary and prescribed course for vessels upbound on Lake Huron, the weather became foggy and at 1:30 P. M., the Miller's speed was reduced to half speed and then to slow speed and fog signals were sounded at regular and proper intervals. About this time the fog signals of a downbound steamer, which proved to be the Glenorchy, were faintly heard a long distance up the Lake. The Miller continued to sound her fog signals and as the repeated fog signals of the. [fol. 3] Glenorchy became more distinct, they indicated that she was on an opposite parallel course to the Miller, a little off the port bow. The Miller blew a passing signal of one blast, and not receiving an answer in due course to this signal, the Miller having in the meantime sounded a fog signal, repeated her one blast to the downbound steamer, which then replied with a similar signal of one blast, whereupon the Miller ported to alter her course to starboard, in compliance with the one blast agreement. After hearing one or more fog signals from the Glenorchy, which were apparently broadening off the port bow, to make assurance of the understanding she repeated the one blast passing signal, which was duly answered by the Glenorchy with a like signal of one, and the Miller, which was navigating in full compliance with the requirements of law applicable to the situation, and exercising proper care, gave her engines a kick ahead on full speed ahead under hard aport helm to alter her course further to starboard. Just as the engines were started full speed ahead under hard aport helm, the Glenorchy suddenly loomed up in the fog a short distance away, heading for the Miller at high speed. The Miller at once reversed and backed full speed astern, but before her headway could be stopped the bows of the vessels came together, severe damage being done to both vessels, and the Glenorchy later sank and, with her cargo, became a total loss.

After the collision and before the Glenorchy sank, the Miller worked alongside of her, and the entire crew of the Glenorchy were rescued and taken aboard the Miller. In

the meantime the Miller had sounded distress signals and the Steamer Wm. G. Mather, upbound without cargo, came to her assistance a short time after the collision, and as the Miller was so damaged that she could not continue her voyage the Mather came alongside and made fast to the Miller's starboard side and accompanied her back to Lake Huron Lightship, where they were met by the Tug Oregon and Lighter Newman, which had come in answer to wireless messages from the Mather.

The Miller's anchors and windlass had been put out of commission in the collision and the Mather anchored above the Lightship with the Miller alongside, where the crew of the Glenorchy were transferred to the Oregon and taken into Sarnia, Ontario. After making some temporary repairs at Port Huron, the Miller returned to Lake Erie, go-
[fol. 4] ing to Toledo, Ohio, where the voyage was abandoned and the cargo sold.

Upon information and belief petitioner avers that said collision and resulting damage occurred without any fault or negligence on the part of its steamer Miller, or of those in charge of her navigations, but was caused by the negligence and carelessness of the steamer Glenorchy, and of those in charge of her navigation, in that she failed to observe the rules and regulations governing the navigation of vessels in fog and for the prevention of collision upon the Great Lakes, especially in respect to lookout, course and speed, compliance with passing signals and precautionary measures to avoid a collision.

4. That said collision happened and the loss, damage and injury above referred to were done, occasioned and occurred without fault on the part of this petitioner and without its privity and knowledge. Nevertheless, The Great Lakes Transportation Company, Ltd., owner of the Steamer Glenorchy and as trustee for the crew, has filed libel against the Miller in this honorable court, claiming damages on account of the loss of the Steamer Glenorchy and the loss of the crew's effects, in the sum of Six Hundred and Twenty Thousand Dollars ($620,000), and Louis Louis-Dreyfus and Charles Louis-Dreyfus, co-partners, trading under the firm name and style of Louis-Dreyfus and Company, owner of the cargo of wheat laden aboard the said Steamer Glenorchy, has filed libel against the Miller for the loss of cargo in the sum of Three Hundred Fifty Thousand Dol-

lars ($350,000.00); and your petitioner avers that the amount of these claims will far exceed the value of said Steamer Miller and her freight pending at the end of the voyage above referred to, and the value of the petitioner's interest in said Steamer and her freight pending at that time. Further, that no freight was earned inasmuch as the Miller was, herself, so damaged by reason of the collision that the voyage could not be completed and had to be abandoned.

Your petitioner desires to claim the benefit of the provisions of Sections 4283, 4284 and 4285 of the Revised Statutes of the United States and the acts amendatory thereto and supplemetnal thereto, relating to limitation of liabiliy of vessel owners; and in this proceeding, by reason of the facts and circumstances hereinbefore set [fol. 5] forth, your petitioner further desires to contest its liability and the liability of said Steamer Miller, to any extent whatever, for any and all loss, destruction, damage and injury caused by and resulting from the collision aforesaid.

5. Petitioner further alleges that by virtue of the Limited Liability Statutes of the United States, if petitioner were to commence a cross action against the owner of the Glenorchy to recover for the damage sustained by the Miller in said collision, the owner of the Glenorchy would be permitted to limit its liability to the value of said steamer and her pending freight at the close of the voyage on which said collision occurred, and inasmuch as a result of said collision the Glenorchy became a total loss and earned no freight said limitation suit would constitute a complete bar to a recovery by petitioner in a cross action brought against the owner of the Glenorchy in this court. Consequently, petitioner claims that should it be found upon final hearing that said collision occurred as a result of fault on the part of both the Miller and Glenorchy, so that the Glenorchy cargo claimants, or other claimants not affected by the fault of the Glenorchy, are entitled to priority as against the owner of the Glenorchy, that petitioner be given the right to set off or recoup one-half of any amount recovered by the other claimants from any balance that might be due as between the two steamers in accordance with the admiralty practice of dividing losses in cases of mutual fault.

6. Your petitioner further alleges that its Steamer Miller is now within this District and that all and singular the premises are true and within the admiralty and maritime jurisdiction of this honorable court.

Wherefore your petitioner prays that this court will cause due appraisement to be had of the amount of the value of its interest in said Steamer Leonard B. Miller at the close of said voyage, no freight having been earned because of the abandonment of the voyage at Toledo, as hereinbefore stated, and will make an order for the payment of the same into court, or for the giving of a stipulation with sureties providing for the payment thereof, as ordered by the court; that the court will order a monition to issue against all persons claiming damages for any and all loss, destruction, damage or injury caused by or resulting from the collision [fol. 6] aforesaid, citing them to appear before a commissioner to be named by the court and make due proof of their respective claims at or before a certain time to be fixed by said return; also to appear and answer on oath the allegations of this petition according to law and the practice of this court, and the court issue its injunction restraining the prosecution of the aforesaid actions of The Great Lakes Transportation Company, Ltd., and Louis Louis-Dreyfus and Charles Louis-Dreyfus, and the commencement and prosecution hereafter of all and any suit or suits, action or actions, and legal proceedings of any nature or description whatever, except in the present proceeding, against petitioner and the said Steamer Miller, in respect of any claim or claims arising out of said collision; that the court in this proceeding will find that the petitioner and the said Steamer Miller are not and neither of them is liable to any extent for said loss, damage or injury, or, if it shall charge that they or either of them are liable then that the liability of the petitioner be limited to the amount of the value of its interest in said steamer and her freight pending at the close of said voyage, if there be any, and the moneys paid or secured to be paid as aforesaid, be divided pro rata among such claimants as may duly prove their claims before the commissioner heretofore referred to, saving to all parties any priority to which they may be legally entitled, or should it find that the damage resulted from mutual fault on the part of the Miller and

the Glenorchy, that there be allowed petitioner, by way of set-off or recoupment, one-half of the amount recovered by the other claimants, from any balance which may be due the claimant of the Glenorchy as set forth in article number 5 of this petition, and that petitioner may have such other and further relief in the premises as may be just.

The Columbia Steamship Company, by John T. Kelly, Its Mgr. Goulder, White & Garry, Proctors for Petitioner.

[fol. 7] *Duly sworn to by John T. Kelly. Jurat omitted in printing.*

IN UNITED STATES DISTRICT COURT

OPINION ON THE MERITS IN THE LIMITATION PROCEEDINGS—Filed June 5, 1926

JONES, J.:

About 2:00 o'clock on the afternoon of October 29th, 1924, the Leonard B. Miller and the Glenorchy came into collision in a fog on Lake Huron, about three or four miles below abreast of Harbor Beach, resulting in the sinking of the Glenorchy with its cargo and damage to the Miller. The Columbia Steamship Company, as owner of the L. B. Miller, filed a petition for limitation of liability. Answers were filed by the owners of the Glenorchy and by the cargo, and issue joined on the question of fault for the collision.

Both vessels were steel ships. The miller, 504 feet in length, 54 feet beam and 30 foot depth, was upbound with 9800 tons of coal; the Glenorchy, about 360 feet in length, 50 feet 2 inches beam and 30 foot depth, was downbound with a cargo of grain. The vessels were substantially on opposite courses as they approached each other and col- [fol. 8] lided almost head-on. The bow of the Miller penetrated the port bow of the Glenorchy from a point about ten feet aft of the port anchor almost to the pilot-house, and at an angle of about 2½ points. According to the evidence of the Glenorchy, she had encountered fog at 1:38 P. M.; thereupon checked her speed to one-half, which would be about five or six miles per hour, and commenced

sounding her fog whistle. At 1:45 P. M. she heard a boat whistle about dead ahead and checked her speed to dead slow. After an exchange of signals with the other boat, her engines were stopped. A few minutes thereafter the Miller was first heard and then seen six or seven hundred feet away. Her engines were then reversed to full speed astern, which was her situation when the collision occurred. The Glenorchy's course down the lake had been south by east ⅜ east, and when about one-half mile past Harbor Beach altered her course ⅜ of a point to the westward to a course of south by east. Upon exchange of fog and port to port passing signals with the approaching ship, her course was again changed to south by west. After another exchange of whistles her wheel was put to port until her course was ⅝ of a point more to starboard. The navigation of the L. B. Miller, according to her evidence, was about as follows: She encountered fog shortly after noon, or at least some time before 1:00 P. M., and continued full speed up the lake, which would be about 11¾ miles per hour; she heard the fog whistle of the downbound vessel at 1:15 P. M. about dead ahead or slightly on her port bow. Her course at that time was about north ½ west. At 1:30 P. M., when the whistles indicated that the ships were closer, she reduced her speed to one-half. About 1:45 a passing signal of one blast was given by her, which was not answered. The second passing signal of one blast was given thereafter, which was answered by the other ship, which later proved to be the Glenorchy. Shortly thereafter, she saw and heard the Glenorchy and was then given a port wheel and a full speed kick ahead. When the collision appeared to be inevitable, her engines were reversed to full speed astern.

It may well be that the navigation of both ships was substantially in accordance with the testimony of each. The difficulty and the fault would appear to have been in their inability to accurately judge the location of each other, although the evidence of both would tend to show that each [fol. 9] realized that the other was about dead ahead or a little on each other's port bow from the beginning of the signal exchanges. I think the proximate fault was the failure of each to more accurately judge the position of the other. If the position of each vessel was as testified

to by both,—dead ahead or slightly off the port bow at the time the signals were exchanged—then neither vessel ported sufficiently to effect a safe passing. If in doubt about each other's position, even after exchange of passing signals, it was the duty of the vessels to sound danger signals as an additional measure of caution. Failure to do so in this situation, under the evidence, would seem to weigh more heavily against the Glenorchy.

From the evidence, I am satisfied that the Miller was running too fast in the fog and did not check her speed in due time, in view of the signals and the knowledge which she had of the approach of another ship. While I believe that the speed of the Miller was excessive and a contributing cause of the disaster, yet I am of opinion that the combined faulty navigation of both ships produced the collision and resulting loss and damage.

A finding and judgment against both ships may be entered.

Paul Jones, United States District Judge.

June 5th, 1926.

IN UNITED STATES DISTRICT COURT

STIPULATION COVERING DAMAGES—Filed Feb. 15, 1927

Reference to the Commissioner in the above entitled cause to take testimony and ascertain and report to the Court the amount of the damages of the respective parties is hereby waived; and

It is hereby stipulated by and between all the parties that the damages are as follows:

[fol. 10] 1. Damages sustained by Louis-Dreyfus & Company, owner of the cargo of wheat laden aboard the Steamer Glenorchy at the time of the collision and which by reason of said collision became a total loss, 208,392-40/60 bushels at $1.54-3/4 per bushel, $322,487.65.

2. Damages sustained by Great Lakes Transportation Company, Ltd., owner of the Steamer Glenorchy, which by reason of said collision became a total loss, $250,000.00.

3. Damage sustained by Great Lakes Transportation Company, Ltd., as trustee for John Scott, a member of the crew of the Glenorchy who sustained personal injuries in said collision, $334.34.

No intervening claim was ever filed in this proceeding on account of said claim, but the Great Lakes Transportation Company, Ltd., having effected settlement with Scott whereby it paid him the sum of $334.34, it is agreed by and between the parties that in the entering of final decree said claim is to be included as if originally filed.

4. Damages sustained by The Columbia Steamship Company, as owner of the Steamer Leonard B. Miller:

Repairs to the Miller, including wreckage, salvage expense and general average sacrifices, and expenditures incurred on behalf of hull, cargo and freight		$118,091.26
Loss of use during detention on account of said collision	$28,082.94	
Less loss of freight of collision trip allowed in general average	3,941.12	
		24,141.82
Total		$142,233.08

Louis-Dreyfus and Charles Louis-Dreyfus, Copartners, Trading under the Firm Name and Style of Louis-Dreyfus & Company, by Bigham, Englar & Jones, Their Proctors. Great Lakes Transportation Company, Ltd., by Holding, Duncan & Leckie, [fol. 11] Its Proctors. Great Lakes Transportation Company, Ltd., Trustee for John Scott, by Holding, Duncan & Leckie, Its Proctors. The Columbia Steamship Company, by Goulder, White and Garry, Its Proctors.

Dated this 14th day of February, 1927.

IN UNITED STATES DISTRICT COURT

ORDER GRANTING LEAVE TO FILE AFFIDAVIT OF JAMES T. IRVING—December 11, 1928

On application of James M. McSweeney and Messrs. Duncan and Mount, proctors for Standard Marine Insur-

ance Company, Ltd., and consent of Messrs. Bigham, Englar & Jones and Messrs. Day & Day, proctors for Scottish Metropolitan Assurance Company, Ltd., leave is hereby granted said proctors for Standard Marine Insurance Company, Ltd., to file the affidavit of James T. Irving as part of the record of this case, and said affidavit is accordingly filed.

IN UNITED STATES DISTRICT COURT

ORIGINAL AFFIDAVIT OF JAMES T. IRVING—Filed Dec. 11, 1928

CANADA,
Province of Manitoba, to wit:

I, James T. Irving, of the City of Winnipeg, in the Province of Manitoba, do solemnly declare:

1. That I am the Assistant-Secretary of the Winnipeg Grain Exchange, situate in the City of Winnipeg, in the Province of Manitoba, and as such have a full knowledge of the facts herein set out.

[fol. 12] 2. That on the 27th day of October, A. D. 1924, the official records of the Winnipeg Grain Exchange for wheat for October delivery, basis in store Fort William or Port Arthur were as summarized hereunder:

Opening price range	$1.54 @ $1.54½	per bushel
High price	$1.55¼	per bushel
Low price	$1.53½	per bushel
Closing price	$1.54¾	per bushel

3. That these are prices for wheat basis in store Fort William or Port Arthur.

And I make this solemn declaration conscientiously believing it to be true and knowing that it is of the same force and effect as if made under oath and by virtue of The Canada Evidence Act.

J. T. Irving.

Declared before me at the City of Winnipeg, in the Province of Manitoba, this 19th day of November, A.D. 1926. Rob't I. Campbell, a notary public in and for the Providence of Manitoba. (Seal.)

In United States District Court

Final Decree on the Merits in Limitation Proceedings—February 15, 1927

The petition and libel of The Columbia Steamship Company having been filed in this Court, showing that it was the owner of the Steamer Leonard B. Miller, which steamer and the Steamer Glenorchy were in collision on Lake Huron on the afternoon of October 29th, 1924, resulting in the total loss of said Steamer Glenorchy and her cargo and [fol. 13] serious damage to the Miller, and petitioner having claimed that any loss, damage, injury or destruction was occasioned without its privity and knowledge, and that it desired to claim the benefits of a limitation of liability under Sections 4283-4285 of the Revised Statutes of the United States and the Acts amendatory thereof and supplemental thereto, and also contest any and all liability in respect to said collision and loss and damage arising therefrom independent of the limitation statutes; and an order of court having been made for an appraisal of petitioner's interest in said steamer at the termination of said voyage (no freight having been earned on said voyage), and said appraisal having been made and the value of petitioner's interest having been fixed in the sum of $424,830.50, and stipulation for such appraised value and interest with the Hartford Accident & Indemnity Company, as surety, having been filed; and an order having been made directing a monition to be issued, citing all persons claiming damages on account of said collision to appear before this Court and make due proofs of their respective claims, with liberty also, upon making proof, to answer said petition and libel, and that said monition having been duly served and published in conformity with the direction of said order; and a report having been made by William B. Wood, Comsioner appointed to hear claims, showing the following claims as having been filed in proper time:

Louis Louis-Dreyfus and Charles Louis-Dreyfus, copartners, trading under the firm name and style of Louis-Dreyfus & Company, owners of the cargo laden aboard the Glenorchy at the time of the collision;

Great Lakes Transportation Company, Ltd., owner of the Steamer Glenorchy at the time of said collision;

and said claimants also having filed answers to the libel and petition of The Columbia Steamship Company, the answer of the Great Lakes Transportation Company, Ltd., owner of the Steamer Glenorchy, alleging among other things that as a result of said collision the Glenorchy became a total loss and was entitled to a limitation of its liability; and petitioner, The Columbia Steamship Company, having filed reply to said answers, containing a prayer that if it should be found that said collision occurred as a result of mutual fault on the part of the Miller [fol. 14] and the Glenorchy, that it be permitted to urge its liability to the claimant of the Glenorchy's cargo by way of set-off or recoupment in reduction of its liability to the owner of the Glenorchy so that a balance might be struck between the Glenorchy's damage and the Miller's damage in accordance with the admiralty practice of dividing losses between vessels guilty of mutual fault; and said cause having come on for hearing before this Court it was stipulated by the proctors for the respective parties in open court that both the petitioner, The Columbia Steamship Company, as owner of the Miller, and claimant, Great Lakes Transportation Company, Ltd., as owner of the Glenorchy, were entitled to a limitation of liability; and the Court having examined the pleadings and having heard the proofs of the parties and having considered the arguments of counsel, and due deliberation having been had, an opinion was filed wherein it was found that both of said vessels, to wit, the Leonard B. Miller, and the Glenorchy, were guilty of faults contributing to the collision, and that the damages should be divided accordingly; and it further appearing from stipulation on file in this Court that the parties have agreed upon the damages and accordingly making it unnecessary to refer the matter of damages to the Commission, said stipulation also providing that the Great Lakes Transportation Company, Ltd., as trustee for John Scott, a member of the crew of the Glenorchy, sustained damage in the sum of $334.34 on account of personal injuries resulting from said collision, and that although no claim was ever filed in this proceeding on account of said claim, it should be included in the final decree as though it had been originally filed.

Now, therefore, it is ordered, adjudged and decreed that said collision and the losses and damages arising there-

from were due and occasioned without the privity or knowledge of petitioner, The Columbia Steamship Company, or claimant, Great Lakes Transportation Company, Ltd., and that said The Columbia Steamship Company, as owner of the Steamer Leonard B. Miller, and the Great Lakes Transportation Company, Ltd., as owner of the Glenorchy are entitled to the benefits of the limitation of liability provided for in Sections 4283-4285 of the Revised Statutes of the United States and the Acts and Statutes amendatory thereof and supplemental thereto; and it further appearing that no other claims having been filed against the Steamer Leonard B. Miller or the Steamer Glenorchy, or [fol. 15] their owners, and that the time for presenting such claims has expired, it is ordered that all persons or corporations, their agents, servants, proctors and attorneys, except the parties to this proceeding, now having or pretending to have any claim or claims against said steamers or their owners, or either of them, arising out of, occasioned by or resulting from the collision on the 29th day of October, 1924, are hereby perpetually restrained and enjoined from the institution or prosecution of any and all suits in respect of such claim or claims;

It is further ordered, adjudged and decreed that the damages caused by said collision between the Steamer Leonard B. Miller and the Steamer Glenorchy, described and referred to in the pleadings in this cause, were occasioned by the mutual fault of said steamers, and that said damages are to be divided equally between the owners of said steamers, the amounts of said damages as stipulated by the parties being as follows:

Louis Louis-Dreyfus and Charles Louis-Dreyfus, co-partners, trading under the firm name and style of Louis-Dreyfus & Company, owner of the cargo on the Glenorchy	$322,487.65
Great Lakes Transportation Company, Ltd., owner of the Steamer Glenorchy	250,000.00
Great Lakes Transportation Company, Ltd., trustee for John Scott	334.34
The Columbia Steamship Company, owner of the Steamer Leonard B. Miller	142,233.08
Total Damages	$715,055.07

It is further ordered, adjudged and decreed that the claim of Louis Louis-Dreyfus and Charles Louis-Dreyfus, copartners, trading under the firm name and style of Louis-Dreyfus & Company, owner of the cargo laden aboard the Steamer Glenorchy at the time of said collision and total loss thereby amounting to the sum of $322,487.65, and the claim of Great Lakes Transportation Company, Ltd., as trustee for John Scott, amounting to $334.34, are entitled to priority of payment out of the fund, secured herein by the stipulation, for value filed by petitioner, The Columbia Steamship Company, in this cause over the other claim [fol. 16] herein mentioned and specified in the stipulation on damages; and

It is further ordered, adjudged and decreed that said Louis Louis-Dreyfus and Charles Louis-Dreyfus, copartners, trading under the firm name and style of Louis-Dreyfus & Company, as owner of the cargo laden aboard said steamer Glenorchy at the time of said collision, and Great Lakes Transportation Company, Ltd., trustee for John Scott, do have and recover from petitioner, The Columbia Steamship Company, and the Hartford Accident & Indemnity Company, as surety on its stipulation, for value in the said several sums hereinbefore found to be due them, together with interest thereon at the rate of 5 per cent per annum from October 29th, 1924, until the same shall be paid, and that the said sums may be paid to their proctors of record in this case and their receipt accepted for the same as final; and it appearing further to the Court that inasmuch as both the Miller and the Glenorchy were at fault and that the amount of damage herein decreed against petitioner, The Columbia Steamship Company, together with the Steamer Leonard B. Miller's own damage, exceeds the damages sustained by claimant, Great Lakes Transportation Company, Ltd., on account of the loss of its Steamer Glenorchy, so that in order to equalize the loss between the parties the balance of recovery would be in favor of petitioner, The Columbia Steamship Company, against claimant, Great Lakes Transportation Company, Ltd., but for the fact that the Glenorchy was a total loss, and that under the right of her owner, Great Lakes Transportation Company, Ltd., to limit its liability, its responsibility for such balance is extinguished:

Now, therefore, it is further ordered, adjudged and decreed that petitioner, The Columbia Steamship Company, shall have the right of set-off and recoupment of the amounts herein decreed against it to the other claimants, together with its own damage, against the damage sustained by claimant, Great Lakes Transportation Company, Ltd., on account of the total loss of the Steamer Glenorchy, and as the aggregate of the former amounts exceeds the later amounts, there can be no affirmative recovery by claimant, Great Lakes Transportation Company, Ltd., as owner of the Glenorchy, against petitioner, The Columbia Steamship Company, and its claim for an affirmative re- [fol. 17] covery on account of the loss of the Steamer Glenorchy is hereby denied.

It is further ordered, adjudged and decreed that the costs on the proceeding for limitation of liability to be taxed be paid by petitioner, The Columbia Steamship Company, and that all other costs to be taxed be equally divided between said The Columbia Steamship Company and the Great Lakes Transportation Company, Ltd.

It is further ordered, adjudged and decreed that if the said several sums, together with the costs shall not be paid, or proceedings thereon taken to appeal within the time limited by law, that each of said claimants entitled to receive any of the sums hereinbefore decreed to be paid, or the costs, shall have execution against The Columbia Steamship Company and the Hartford Accident & Indemnity Company for the whole thereof or so much thereof as may at any time remain unpaid, together with the costs incurred thereby.

Approved as to form:

Bigham, Englar & Jones, Proctors for Louis Louis-Dreyfus and Charles Louis-Dreyfus, Copartners, Trading under the firm name and style of Louis-Dreyfus & Company. Holding, Duncan & Leckie, Proctors for Great Lakes Transportation Company, Ltd., as owner of the Steamer Glenorchy. Holding, Duncan & Leckie, Proctors for Great Lakes Transportation Company, Ltd., as Trustee for John Scott. Goulder, White & Garry, Proctors for The Columbia Steamship Company.

[fol. 18] IN UNITED STATES DISTRICT COURT

AMENDED PETITION OF INTERVENTION OF STANDARD MARINE INSURANCE COMPANY, LTD.—Filed April 23, 1927

The amended petition of Standard Marine Insurance Company, Ltd., intervening for its interest, by subrogated rights, in the fund in court in the above entitled cause, represented by the bond or stipulation for value of the S/S Leonard B. Miller, filed therein, respectfully alleges upon information and belief, as follows:

First. At all the times hereinafter mentioned, your petitioner, Standard Marine Insurance Company, Ltd., was and it still is a corporation duly organized and existing under and by virtue of the laws of the Kingdom of Great Britain, having an office and place of business in the Dominion of Canada, at 64 King Street East, City of Toronto, and it was at all the times hereinafter mentioned and still is engaged in the insurance business.

Second. On or about July 12, 1924, your petitioner, Standard Marine Insurance Company, Ltd., issued its open policy of marine insurance No. 1010, wherein and whereby it insured Louis-Dreyfus & Company against perils of the Lakes and other enumerated perils on grain owned by the said assured or in which the said assured might have an interest, at and from port or ports on the Great Lakes, to other port or ports on the Great Lakes, commencing with shipments made after midnight, June 10, 1924, and up to and including all vessels sailing prior to midnight, December 12, 1924.

The amount of said insurance effective from August 1, 1924, as provided by endorsement attached to the said policy on August 1, 1924, was as follows:

"To cover increased value on grain owned by the assured or in which the assured may have an interest, such increased value for the purposes of this insurance to be arrived at by taking the difference between the c.i.f. invoice cost and the highest market value per bushel, plus 5¢ (five cents) as set out in the New York Journal of Commerce between the day of sailing of the vessel at point of shipment, and the day of the final delivery of the complete cargo at

destination as named in the certificate, both days inclusive; and in the event of casualty to be valued at the difference between the c.i.f. invoice cost and the highest market value [fol. 19] per bushel, plus 5¢ (five cents as set out in the New York Journal of Commerce between the day of sailing of the vessel at point of shipment and the day the final delivery of the complete cargo would have arrived at destination if casualty had not occurred, both days inclusive."

A copy of the said policy of insurance is hereto annexed, marked Schedule "A" and is made a part of this petition.

Third. The said Louis-Dreyfus & Company, the assured under the above mentioned policy of marine insurance, shipped or caused to be shipped 200,000 bushels of wheat on the S/S Glenorchy at Port Arthur, Canada, on October 27, 1924, bound for Port Colborne, Canada. The said shipment of wheat was covered by the policy of marine insurance above referred to on the said voyage from Port Arthur to Port Colborne against perils of the Lakes.

On October 29, 1924, during the pendency of the said insurance and while the said wheat was on board the S/S Glenorchy, the said steamship and cargo sank in collision with the steamer Leonard B. Miller, and both the S/S Glenorchy and her said cargo became a total loss.

Fourth. By reason of the said total loss of the said cargo of wheat your petitioner, Standard Marine Insurance Company, Ltd., became liable to pay and did pay to the said Louis-Dreyfus & Company, the sum of $62,500, the amount of said insurance.

Fifth. In the above entitled proceedings for limitation of liability, instituted by Columbia Steamship Company, as owner of the steamer Leonard B. Miller, to limit liability for damage claims arising out of the collision above mentioned, this Court has held that the said collision between the steamship Glenorchy and the steamer Leonard B. Miller was due to the faults of both vessels, and by final decree entered in these proceedings on or about February 15, 1927, has ordered, adjudged and decreed that Louis Louis-Dreyfus and Charles Louis-Dreyfus, copartners, trading under the firm name and style of Louis-Dreyfus & Company, as owners of the cargo laden on board the said S/S Glenorchy

at the time of said collision, have and recover from the peitioner, the Columbia Steamship Company and the Hartford Accident & Indemnity Company, as surety on its stipulation for value, the sum of $322,487.65, (of which the sum [fol. 20] of $309,500 was for the 200,000 bushels of wheat hereinbefore referred to), together with interest thereon at the rate of five (5) per cent per annum from October 29, 1924, until the same shall be paid, and that the said sum may be paid to the proctors of record of the said Louis Louis-Dreyfus and Charles Louis-Dreyfus, trading under the firm name and style of Louis-Dreyfus & Company in this case, and their receipt accepted for the same as final.

Sixth. The said Louis Louis-Dreyfus and Charles Louis-Dreyfus, copartners, doing business at Louis-Dreyfus & Company, had other insurance on the said 200,000 bushels of wheat, placed with Scottish Metropolitan Insurance Company, which other insurance also covered the said cargo against perils of the Lakes on the voyage in question, and as a result of said collision, and loss the said Scottish Metropolitan Insurance Company paid under its policy to the said Louis-Dreyfus & Company, the sum of $284,000 on account of the loss of the said 200,000 bushels of wheat.

Seventh. By reason of the premises, the said Scottish Metropolitan Insurance Company and your petitioner, Standard Marine Insurance Company, Ltd., were co-insurers of the said 200,000 bushels of the said cargo, and by subrogation are entitled to have the said sum of $309,500 (being that part of the $322,487.65 decreed by said final decree of February 15, 1927 to be paid by the Columbia Steamship Company to Louis-Dreyfus & Company, which represents the value of said 200,000 bushels of wheat) divided pro rata between them in the proportion of the payments made by them to the said Louis-Dreyfus & Company under their respective policies.

The claim filed in these limitation proceedings in the name of Louis-Dreyfus & Company was in fact filed in their name by Scottish Metropolitan Insurance Company and the latter's proctors appear as proctors of record for Louis-Dreyfus & Company. Any and all money awarded by the said final decree to Louis Dreyfus & Company, will, in fact,

be paid to the said proctors of record of Louis-Dreyfus & Company, who are in fact proctors for the said Scottish Metropolitan Insurance Company. The said Scottish Metropolitan Insurance Company and their said proctors have refused to recognize the right of your petitioner, Standard Marine Insurance Company, Ltd., to a pro rata [fol. 21] share of such payment, and have claimed that your petitioner, Standard Marine Insurance Company, Ltd., is only entitled to the surplus in the said $309,500 remaining after the Scottish Metropolitan Insurance Company has been paid $284,000 in full. Such disposition of the amount decreed to be paid to Louis-Dreyfus & Company under the final decree of February 15, 1927, would result in your petitioner receiving only approximately the principal sum of $25,500, whereas your petitioner is informed and believes and therefore alleges that it is legally entitled to its pro rata share of the said $309,500, which pro rata share would amount to a principal sum in excess of $56,000.

Eighth. No payment has as yet been made under said final decree of February 15, 1927 in these limitation proceedings.

Ninth. All and singular the foregoing premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

Wherefore your petitioner prays that the said Louis Louis-Dreyfus and Charles Louis-Dreyfus, co-partners trading under the firm name and style of Louis-Dreyfus & Company, be required to answer the allegations of this petition, and that this Court determine the respective rights of the said Scottish Metropolitan Insurance Company and your petitioner to the said award of $309,500 to be paid by Columbia Steamship Company and/or its stipulator and/or its surety on its stipulation for value, and that this Court enter an order herein directing the said Columbia Steamship Company and/or its surety the said Hartford Accident & Indemnity Company, to pay to your petitioner, Standard Marine Insurance Company, Ltd., its pro rata share of the said sum of $309,500, with interest thereon at the rate of five (5) per cent per annum from October 29, 1924, as may be determined by this Court after full hearing of the issues raised by this petition, and that

your petitioner may have such other and further relief as may be just in the premises.

James M. McSweeney, Guarantee Title Building, Cleveland, Ohio. Duncan & Mount, 27 William Street, New York City, New York, Proctors for Petitioner.

[fol. 22] *Duly sworn to by A. B. Pakenham. Jurat omitted in printing.*

[fol. 23] SCHEDULE "A" TO AMENDED PETITION OF INTERVENTION

Copy

Lake Cargo. No. 1010

Standard Marine Insurance Company, Limited, of Liverpool, England

A. B. Pakenham, Toronto Insurance & Vessel Agency, Ltd., 64 King St. East, Toronto, Canadian Agent

By this policy of insurance on account of Louis-Dreyfus & Company.

Loss, if any, payable to the assured or order.

(This Company not to be liable for more than $50,000 "Increased Value", $100,000 Other shipments per any one vessel, or in any one place, at any one time.

Warranted by the assured free from loss or expense arising from capture, seizure, restraint, detention or destruction, and the consequences thereof, or of any attempt thereat and also from all consequences of riots, civil commotions, insurrections, hostilities or warlike operations, whether before or after declaration of war; and whether lawful or unlawful; and whether by the act of any belligerent nations, or by governments of seceding or revolting states, or by unauthorized or lawless persons therein, or otherwise; and whether occurring in a port of distress or otherwise.)

[Sum Insured, As agreed.]

[Premium, As agreed.]

Do make insurance, and cause the several persons indorsed hereon, or in the books attached hereto, to be insured upon all kinds of Lawful Goods, Wares, Merchandise and Produce, laden on board the good Vessel or Vessels, Boat or Boats, Railroad or Carriage, Lost or Not Lost, at and from ports and places to ports and places on a lawful and regular route and voyage, for the several amounts, and at the rates as hereon indorsed, subject to the conditions of this Policy, or of any Contract Proposition covered by this Policy, according to their true intent and meaning.

Beginning the adventure upon the said property from and immediately following the loading thereof at the port or place named in the endorsement, and so shall continue and endure until the same shall arrive and be safely landed at the port of destination, and not to exceed forty-eight hours from the time of arrival.

[fol. 24] Touching the adventures and perils which this Company is contented to bear and take upon itself, they are of the Lakes, Rivers, Canals, Railroads, Fires, Jettisons, and all other perils or misfortuntes that have or shall come to the hurt, detriment, or damage of the said property or any part thereof, excepting all perils, losses or misfortunes arising from the want of ordinary care and skill in loading and stowing the cargo of, or in navigating the said vessel, from theft, barratry or robbery, or other legally excluded causes. And in case of loss or misfortune, it shall be lawful and necessary to and for the insured or insurer, their agents, factors, servants and assigns, to sue, labor and travel for, in and about the defense, safeguard and recovery of the said goods and merchandise, or any part thereof, without prejudice to this insurance; nor shall the acts of the insured or insurers, in recovering, saving and preserving the property insured, in case of disaster, be considered a waiver or an acceptance of abandonment, nor as affirming or denying any liability under this Policy, but such acts shall be considered as done for the benefit of all concerned, without prejudice to the rights of either party; to the charges whereof the said Company will contribute in such proportion as the sum herein insured bears to the whole value of the property so insured. Moneys and Bullion, Promissory Notes, and other evidences of debt, Books of Accounts, Written Securities, Deeds or other evidences of

title to property of any kind, are not covered by this Policy, unless expressly defined as so insured.

And in case of loss, such loss to be paid in thirty days after proof of loss, and proof of interest in said property are furnished this Company. Provided always, and it is hereby further agreed, that if the said insured shall have made any other insurance upon the property aforesaid, prior in date to this policy, then this Company shall be answerable only for so much as the amount of such prior insurance may be deficient towards fully covering the property hereby insured; and this Company shall return the premium upon so much of the sum by them insured as they shall be by such prior insurance exonerated from. And in case of any insurance upon the said Property, subsequent in date to this Policy, this Company shall nevertheless be answerable for the full extent of the sum by them subscribed hereto, without right to claim contribution from such subsequent insurers, and shall accordingly be entitled to retain the premium by them received, in the same man-[fol. 25] ner as if no subsequent insurance had been made. Warranted that any insurance granted herein shall not cover where the assured or any carrier or other bailee has insurance which would attach, if this policy had not been issued. And in case of loss or damage to the property hereby insured, this Company, its agent or representative at or nearest the first port of discharge shall have prompt notice of same, and shall have every opportunity and facility for ascertaining the cause, extent and amount of damage, by personal inspection, appraisal, or sale of the damaged property. It is also agreed, that the property be warranted by the insured free from any charge, damage or loss, which may arise in consequence of a seizure or detention, for or on account of any illicit or prohibited trade, or any trade in articles contraband of war. It is furthermore hereby expressly provided, that no suit or action against this Company, for the recovery of any claim for loss or damage upon, under or by virtue of this Policy, shall be sustained in any Court of Law or Equity, unless such suit or action shall be commenced within the term of twelve months next after the loss or damage shall occur; and in case any such suit or action, shall be commenced after the expiration of twelve months next after such loss or damage shall have occurred, the lapse of time shall be taken

and deemed as conclusive evidence and a conclusive defence against the validity of the claim thereby so attempted to be enforced.

This insurance warranted to be in all cases null and void as concerns loss or damage from fire on land to the extent of any fire insurance directly or indirectly covering upon the same property, whether prior or subsequent hereto in date, and it is also understood and agreed, that in case any agreement be made or accepted by the assured with any carrier by which it is stipulated that such or any carrier shall have, in case of any loss for which he may be liable, the benefit of this insurance, or exemption in any manner from responsibility grounded on the fact of this insurance, then and in that event the insurer shall be discharged of any liability for such loss hereunder, but this policy in these and all cases of loss or damage by perils insured against shall be liable and owe actual payment for (only) what cannot be collected from carrier and/or bailee and/or fire insurers of property lost or damaged, as before stated, but in case of final failure to collect from carrier and/or bailees and/or fire insurers, this policy shall be duly liable, pro- [fol. 26] vided always the loss shall constitute in other respects a claim under this insurance, and in the event of loss or damage, this policy shall be null and void to the extent of any payment made by any carrier or bailee, liable or not, or any payment made by any party in purchase of a claim hereunder, any assignment whatever given by the assured to the contrary notwithstanding.

It is also understood and agreed, that in case of loss or damage under this policy, the assured, in accepting payment therefor, thereby and by that act assigns and transfers to this company all his or their right to claim for loss or damage, as against the carrier or other person or persons, to inure to their benefit, however, to the extent only of the amount of the loss or damage and attendant expenses of recovery paid or incurred by this Company; and any act of the Insured, waiving or transferring, or tending to defeat or decrease any such claim against the carrier, or such other person or persons, whether before or after the insurance was made under this Policy, shall be a cancellation of the liability of this Company, for or on account of the risk for which loss is claimed.

And it is understood and agreed, that this Company, or its Agent, shall have free access, at all reasonable hours, to

the books, accounts, instructions and correspondence of the assured, containing statements of, or which relate to shipments and receipts covered by this Policy; and this Policy may be declared void by either party, on giving a written notice to that effect to the other party; but without prejudice to any shipment or liability made or incurred prior to the service of such notice.

Deck Cargoes. It is understood that property covered by this Policy on Lake Vessels, shall be under deck, unless otherwise specified and charged for additionally in the endorsement hereon; and deck cargoes are insured against total loss of packages only; the minimum rates of such loss to make a claim shall be ten per cent., except salt, which shall be twenty per cent. of the whole number of packages insured on deck; and in all cases on deck risks to be free from damage by wet, breakage, leakage, or exposure.

Warranted by the insured free from damage or injury from dampness or frost, heating, sweating, steaming, change of flavor, or being spotted, discolored, musty, or [fol. 27] mouldy, except caused by actual water contact with the article damaged, and to be free from liability for leakage on molasses or other liquids, or breakage of articles liable to break from their own nature, unless occasioned by the perils insured against.

If the voyage aforesaid shall have begun, and shall have terminated before the date of this Policy, then there shall be no return of premium on account of such termination.

No shipment to be considered as insured until approved and endorsed hereon by a representative of the Company.

It is understood and agreed, as one of the conditions under which this Policy is issued and endorsements made hereon, that if the insurance is procured by any person or persons other than the assured, they shall be deemed the agent or agents of the Assured and not of this Company in any and all transactions relating to this insurance.

This policy is subject to the usages and regulations of the Ports of Chicago or New York, in all matters of adjustment and settlement of losses and averages not herein otherwise clearly specified and provided for, as may be stated by a competent distinterested adjuster of marine losses, to be designated by the insurers; but no partial loss or particular average to be paid unless amounting to Five Per Cent.

In witness whereof the undersigned on behalf of the said company has hereunto set his hand in Toronto the Twelfth day of July, 1924.

Standard Marine Insurance Company, Ltd., Toronto Insurance & Vessel Agency, Ltd., A. B. Pakenham, Director, Canadian Agent.

Standard Marine Insurance Co., Ltd.

Endorsement to be Attached to and Made Part of Policy No. 1010, Issued to Louis Dreyfus & Company

Clause No. 3 of this policy is hereby altered to read as follows, from the date hereof:

To cover "Increased Value" on grain owned by the Assured or in which the Assured may have an interest, such "Increased Value" for the purposes of this insurance, to be arrived at by taking the difference between the C. I. F. invoice and the highest market value per bushel, plus 5¢ [fol. 28] (Five cents), as set out in the "New York Journal of Commerce" between the day of sailing of the vessel at point of shipment, and the day of the final delivery of the complete cargo at destination as named in the Certificate, both days inclusive; and in the event of casualty, to be valued at the difference between the C. I. F. invoice cost and the highest market value per bushel, plus 5¢ (Five cents) as set out in the "New York Journal of Commerce" between the day of sailing of the vessel at point of shipment, and the day the final delivery of the complete cargo would have arrived at destination if casualty had not occurred, both days inclusive. Advice of all such shipments to be mailed to the Company, 64 King Street East, Toronto, Ontario, Canada, by registered letter on day of sailing of the vessel, or as soon thereafter as practicable.

Standard Marine Insurance Company, Ltd., ——, Attorney. (Seal.)

Toronto, August 1st, 1924.

Standard Marine Insurance Co., Ltd.

Endorsement to be Attached to and Made Part of Policy No. 1010, Issued to Louis Dreyfus & Company

Notwithstanding anything contained herein to the contrary, it is understood and agreed that the limit under this

policy is increased to cover as of all shipments on vessels sailing after midnight August 27th, 1924, an amount not exceeding $150,000 (One hundred and fifty thousand dollars) on increased value by any one steamer, or not exceeding $150,000 (One hundred and fifty thousand dollars) on basic risk by any one steamer, but in no case exceeding $150,000 (One hundred and fifty thousand dollars) combined increased value and basic risk by any one steamer.

All other terms and conditions remaining unchanged.

Standard Marine Insurance Company, Ltd., ——
——, Attorney. (Seal.)

Toronto, November 4th. 1924.

Standard Marine Insurance Co., Ltd.

Endorsed to be Attached to and Made Part of Policy No. 1010, Issued to Louis Dreyfus & Company

[fol. 29] Notwithstanding anything contained herein to the contrary, it is understood and agreed that the limit under this policy is increased, as of all shipments on vessels sailing after midnight November 3rd, 1924, to an amount not exceeding $400,000 (Four Hundred thousand dollars) on increased value on any one iron or steel steamer, or $400,000 (Four hundred thousand dollars) on basic risk by any one iron or steel steamer, but in no case to cover an amount in excess of $400,000 (Four hundred thousand dollars) combined increased value and basic risk by any one iron or steel steamer.

All other terms and conditions remaining unchanged.

Standard Marine Insurance Company, Ltd., ——
——, Attorney. (Seal.)

Toronto, November 4th. 1924.

Standard Marine Insurance Co., Ltd.

Endorsement to be Attached to and Made Part of Policy No. 1010, Issued to Louis Dreyfus & Company.

This Policy is altered as from inception to cover shipments termed "Increased Values Only" and not basic risks, as per the following clauses:

It is understood and agreed that this Company waives its right to participate in any salvage realized from the sale of damaged grain.

Notwithstanding anything contained in this policy and/or certificates issued hereunder, it is wararnted by the assured that this policy and/or certificates issued hereunder, is free from General Average, Salvage and Special Charges excepting in the case of contributory value over the original amount insured.

All other terms and conditions remaining unchanged.

Standard Marine Insurance Company, Ltd., ——
——, Attorney. (Seal.)

Toronto, November 4th. 1924.

[fol. 30] Copy

Standard Marine Insurance Co., Ltd.

Schedule Attached to and Forming Part of Policy No. 1010

1. To Louis-Dreyfus & Company.

2. For account of themselves; loss, if any, payable to their order.

3. To cover "Increased Value" on grain owned by the Assured or in which the Assured may have an interest, such "Increased Value," for the purposes of this insurance, to be arrived at by taking the difference between the C. I. F. invoice cost and the market value per bushel as set out in the "New York Journal of Commerce" on the date of sailing of the vessel, plus 5¢ (Five Cents) per bushel added thereto: Advices of all such shipments to be mailed to the Company, 64 King Street East, Toronto, Ontario, Canada, by registered letter on date of sailing of the vessel, or as soon thereafter as practicable.

4. To cover all shipments of grain owned by the Assured, or in which the Assured may have an interest and not insured by the Shipper, such shipments to be valued for the purposes of this insurance, at amount declared, such amount declared and advices of such shipments to be mailed to the Company, 64 King Street, East, Toronto, Ontario, Canada, by registered letter prior to sailing of the vessel.

5. It is understood and agreed that this Policy is not liable for an amount in excess of $50,000 (Fifty thousand dollars) on 'Increased Value," and $100,000 (One Hundred thousand dollars) on other shipments by any one vessel at

any one time, unless accepted by the Company in writing prior to sailing of the vessel, and before known or reported loss.

6. This policy attaches to and covers 100% (One hundred per cent) of all shipments insured hereunder.

7. This policy, and all insurance taken under it, to be subject to amendment to conform to any and all instructions sent by the Underwriters interested hereunder from time to time.

8. Per steamer and/or steamers classed for the carriage of grain in the American Bureau of Shipping Great Lakes [fol. 31] Handbook for the year 1924, including transshipment, if any.

9. At and from port or ports on the Great Lakes to other port or ports on the Great Lakes and St. Lawrence River as far East as Montreal, commencing with shipments made after Midnight June 10th, 1924, and to continue up to and including all vessels sailing prior to Midnight, December 12th, 1924.

10. It is understood and agreed that the termination of this policy by its terms on December 12th, 1924, shall not affect risks on grain involving winter storage at port of destination, such risks to be held covered until discharged; or on grain shipped under bill of lading involving winter storage at port of shipment together with the first trip down in the Spring, such risks to be held covered until arrival at Lake destination.

11. At the request of the Assured it is agreed that certificates under this policy shall cover against "All damage resulting from faults or errors in navigation, or in the management of the vessels," from which vessels

/and . . . . .

Copy.

Schedule attached to Policy
No. 1010 . . . . . Page Two.

(11. cont'd.) and/or their Owners, Agents or Charterers are relieved of responsibility by the clause in Section 3 of the so-called Harter Act from which the above quoted words are literally extracted, but nothing in this agreement shall be construed to render the Assurers liable under any cir-

cumstances for any loss or damage due to the Vice Propre of the grain itself; other conditions remaining unchanged.

12. This policy shall not be vitiated by any unintentional error in description of voyage or interest, or by deviation, provided same be communicated to the Assurers as soon as known to the Assured and an additional premium paid if required.

13. Held covered until discharged from the vessel for a period of not exceeding 18 (eighteen) days after arrival. For the time exceeding 72 (Seventy-two) hours an additional premium pro rata of the fifteen day tariff rate shall be paid by the original insured.

14. It is hereby understood and agreed that risks on grain while in elevators in no case are to be covered hereunder.

[fol. 32] 15. The rates and premiums under this contract are to be in accordance with the rates agreed in writing and based upon a book and/or table of classification of vessels to be furnished by the Assurers, both said rates and table of classification of vessels to be considered as part of this contract.

16. Premiums payable monthly in cash.

17. Premiums and losses payable in United States funds or equivalent.

18. Attached to and forming part of Standard Marine Insurance Company Limited Policy No. 1010.

Standard Marine Insurance Company, Ltd. Toronto Insurance & Vessel Agency, Ltd., A. B. P., Director, Canadian Agent. (Seal.)

Toronto, July 12th, 1924.

IN UNITED STATES DISTRICT COURT

ANSWER OF SCOTTISH METROPOLITAN ASSURANCE COMPANY, LTD., TO THE AMENDED PETITION—Filed June 16, 1927

The answer of Scottish Metropolitan Assurance Company, Limited, to the amended petition of Standard Marine

Insurance Company, Limited, in the above proceeding, alleges upon information and belief as follows:

First. Claimant admits the allegations contained in article "First" of said petition.

Second. Claimant denies each and every allegation contained in article "Second" of said petition, except as the same are hereinafter specifically admitted or modified in this answer.

[fol. 33] Third. Claimant admits that on or about October 27, 1924, Louis Dreyfus & Company caused to be shipped 200,000 bushels of wheat on the S. S. "Glenorchy" at Port Arthur, Canada, and admits that on or about October 29, 1924, the S. S. "Glenorchy" and the said cargo of wheat became a total loss, and denies each and every other allegation contained in article "Third" of said petition.

Fourth. Claimant denies that it has any knowledge or information sufficient to form a belief as to the allegations contained in article "Fourth" of said petition and therefore puts the petitioner to the proof of said allegations.

Fifth. Claimant admits the allegations contained in article "Fifth" of said petition.

Sixth. Claimant admits that the said Louis Dreyfus and Charles Louis Dreyfus, copartners doing business as Louis Dreyfus & Company, had placed insurance on the said 200,000 bushels of wheat with this claimant, Scottish Metropolitan Assurance Company, Limited, and that said insurance covered this cargo against perils of the lakes on the voyage in question and that as a result of said collision and the subsequent loss of said cargo, this claimant, Scottish Metropolitan Assurance Company, became obligated to pay, and did pay, to the said Louis Dreyfus & Company the sum of $284,000, on account of the total loss of the said 200,000 bushels of wheat, and denies each and every other allegation of Article Sixth of said petition.

Seventh. Claimant denies each and every allegation contained in article "Seventh" of said petition, except that it admits that this claimant and its proctors refuse to recog-

nize the right of the petitioner, Standard Marine Insurance Company, Limited, to a pro rata share of any payments made in this proceeding on account of the loss of the aforesaid 200,000 bushels of wheat, and that this claimant maintains that the Standard Marine Insurance Company, Limited, is only entitled to the surplus in said recovery remaining after this claimant, Scottish Metropolitan Assurance Company, Limited, has been paid the sum of $284,000 with interest.

Eighth. Claimant admits the allegations contained in article "Eighth" of said petition.

Ninth. Claimant admits the Admiralty and Maritime [fol. 34] jurisdiction of the United States and of this Honorable Court, and denies each and every other allegation contained in article "Ninth" of said petition.

Further answering the aforesaid petition, claimant alleges that the true facts and circumstances attending these matters are as follows:

Tenth. On or about February 22, 1924, your claimant, Scottish Metropolitan Assurance Company, Limited, issued its open policy of marine insurance No. L100023 to Alberta Cooperative Wheat Producers, Limited, and that on or about September 10, 1924, said policy of insurance was endorsed over, with the consent of said Alberta Cooperative Wheat Producers, Limited, and with the consent of your claimant, Scottish Metropolitan Assurance Company, Limited, to the Canadian Cooperative Wheat Producers, Limited. This insurance, as provided by endorsement attached to the said policy dated October 9, 1924, was as follows:

"To cover 100% interest in all shipments of grain and/or flaxseed and/or cereals and/or maize, their own, or in which they may have an insurable interest, or the property of others which they may receive instructions to insure, such instructions being mailed or given the Canadian Co-Operative Wheat Producers, Limited, in writing, prior to shipment and before any known or reported loss or accident."

"All other terms and conditions remaining unchanged."

Eleventh. Under contract dated August 25, 1924, Louis Dreyfus & Company purchased from the Canadian Co-Operative Wheat Producers, Limited, 200,000 bushels of Manitoba No. 2 Northern Wheat for future delivery at Montreal, Canada, the invoices covering said purchase being dated October 28, 1924. Thereafter, on or about October 27, 1924, the said Canadian Co-Operative Wheat Producers, Limited, shipped the said 200,000 bushels of wheat from Port Arthur and Fort William, Canada, on the S. S. "Glenorchy" for delivery at Montreal.

Twelfth. On October 28, 1924, your claimant, Scottish Metropolitan Assurance Company, Limited, issued under its open policy No. L100023 to the Canadian Co-Operative Wheat Producers, Limited, two certificates of insurance numbered respectively A15017 and A15018, each covering 100,000 bushels of the said shipment of wheat and each in the amount of $142,000, or a total of $284,000 on this shipment, and said certificates of insurance were, in due course, [fol. 35] endorsed and assigned by the assured to Louis Dreyfus & Company. Said certificates of insurance are attached to the agreed statement of facts submitted herewith and are marked Exhibits "D" and "E", and are made a part of this answer.

Thirteenth. By reason of the total loss of the said cargo of wheat, your claimant, Scottish Metropolitan Assurance Company, Limited, became liable to pay, and on November 3, 1924, did pay to the said Louis Dreyfus & Company the sum of $284,000 the amount of said insurance. This payment was made on said certificates of insurance No. A15017 and No. A15018 covering the grain which had been insured under open policy No. L100023.

Fourteenth. The policy of insurance issued by the Standard Marine Insurance Company, Ltd., to which reference is made in Article "Second" of the petition herein, did not constitute insurance on the said 200,000 bushels of wheat, but the subject matter of said insurance as specifically set forth in said policy, was an "Increased Value" which increased value was in excess of the market value of the grain and which was to be determined in accordance with the terms of the contract of insurance between the Standard

Marine Insurance Company, Ltd., and Louis Dreyfus & Company.

Fifteenth. That by reason of the payment by your claimant, Scottish Metropolitan Assurance Company, Limited, to Louis Dreyfus & Company, of the sum of $284,000 due under its policy, your claimant has become subrogated to the right of recovery of Louis Dreyfus & Company in this proceeding to the full extent of its payment to the assured, with interest to date of payment.

Sixteenth. That the Standard Marine Insurance Company, Limited, having insured the increased value of the 200,000 bushels of wheat, is entitled to be subrogated to the rights of the assured, Louis Dreyfus & Company, in the increased value of said wheat in excess of the sum of $284,000 previously insured by the shipper, Canadian Co-Operative Wheat Producers, Limited, with your claimant, Scottish Metropolitan Assurance Company, Limited.

Seventeenth. All and singular the premises are true.

Wherefore your claimant prays that this Honorable Court will be pleased to decree that your claimant, Scottish Met-
[fol. 36] ropolitan Assurance Company, Limited, share in any recovery in the above proceeding to the extent of your claimant's interest as hereinbefore set forth, and for such other and further relief in the premises as may be just and proper.

Bigham, Englar & Jones, Proctors for Claimant, Scottish Metropolitan Assurance Company, Limited, No. 64 Wall St., Borough of Manhattan, New York City, N. Y. Day & Day.

Duly sworn to by William L. Day. Jurat omitted in printing.

IN UNITED STATES DISTRICT COURT

PETITION FOR INTERVENTION OF SCOTTISH METROPOLITAN ASSURANCE CO., LTD.—Filed June 16, 1927

The petition of the Scottish Metropolitan Assurance Company, Limited, intervening on its own behalf in the above

[fol. 37] entitled proceeding, respectfully alleges, upon information and belief, as follows:

First. Your petitioner is and at all times hereinafter mentioned was a corporation duly organized and existing under and by virtue of the laws of the Kingdom of Great Britain, engaged in the insurance business with an office and place of business located in the City of Toronto, Province of Ontario, Canada.

Second. On or about February 22, 1924, your petitioner, Scottish Metropolitan Assurance Company, Limited, issued its open policy of marine insurance No. L100023 to Alberta Cooperative Wheat Producers, Limited, and that on or about September 10, 1924, said policy of insurance was endorsed over, with the consent of said Alberta Cooperative Wheat Producers, Limited, and with the consent of your petitioner, Scottish Metropolitan Assurance Company, Limited, to the Canadian Co-Operative Wheat Producers, Limited. This insurance, as provided by endorsement attached to the said policy dated October 9, 1924, was as follows:

"To cover 100% interest in all shipments of grain and/or flaxseed and/or cereals and/or maize, their own, or in which they may have an insurable interest, or the property of others which they may receive instructions to insure, such instructions being mailed or given the Canadian Co-Operative Wheat Producers, Limited, in writing, prior to shipment and before any known or reported loss or accident."

"All other terms and conditions remaining unchanged."

A copy of the said policy of insurance and endorsement is annexed to the agreed statement of facts submitted herewith, marked Exhibit "C" and is made a part of this petition.

Third. Under contract dated August 25, 1924, Louis-Dreyfus & Company purchased from the Canadian Co-Operative Wheat Producers, Limited, 200,000 bushels of Manitoba No. 2 Northern Wheat for future delivery at Montreal, Canada, the invoices covering said purchase being dated October 28, 1924. Thereafter, on or about Octo-

ber 27, 1924, the said Canadian Co-Operative Wheat Producers, Limited, shipped the said 200,000 bushels of wheat from Port Arthur and Fort William, Canada, on the S. S. "Glenorchy", for delivery at Montreal.

[fol. 38] Fourth. On October 28, 1924, your petitioner, Scottish Metropolitan Asurance Company, Limited, issued under its open policy No. L100023 to the Canadian Co-Operative Wheat Producers, Limited, two certificates of insurance numbered respectively A15017 and A15018, each covering 100,000 bushels of the said shipment of wheat and each in the amount of $142,000, or a total of $284,000 on this shipment, and said certificates of insurance were, in due course, endorsed and assigned by the assured to Louis-Dreyfus & Company. Said certificates of insurance are attached to the agreed statement of facts submitted herewith and are marked Exhibits "D" and "E", and are made a part of this petition.

Fifth. On October 29, 1924, during the pendency of said insurance and while the said wheat was on board the S. S. "Glenorchy" the said S. S. "Glenorchy" and cargo sank in collision with the S. S. "Leonard B. Miller", and both the "Glenorchy" and her cargo of wheat became a total loss.

Sixth. By reason of the total loss of the said cargo of wheat, your petitioner, Scottish Metropolitan Assurance Company, Limited, became liable to pay, and on November 3, 1924, did pay to the said Louis-Dreyfus & Company the sum of $284,000, the amount of said insurance. This payment was made on said certificates of insurance No. A15017 and No. A15018 covering the grain which had been insured under open policy No. L100023.

Seventh. In the above entitled proceedings for limitation of liability instituted by Columbia Steamship Company as owner of the S. S. "Leonard B. Miller", this Court has held that the collision between the S. S. "Glenorchy" and the S. S. "Leonard B. Miller" was due to the faults of both vessels and by final decree entered in this proceeding on or about February 15, 1927, has ordered, adjudged and decreed that Louis Louis-Dreyfus and Charles Louis-Dreyfus, copartners trading under the firm name and style of

Louis-Dreyfus & Company, as owners of the cargo laden on the S. S. "Glenorchy" at the time of said collision, have and recover from the petitioner, Columbia Steamship Company, and the Hartford Accident & Indemnity Company, as surety, the sum of $322,487.65, of which amount the sum of $309,500 is on account of the 200,000 bushels of wheat hereinbefore referred to, together with interest thereon at the rate of five per cent. per annum from October 29, 1924, until the same shall be paid.

[fol. 39] Eighth. That after the entry of the final decree herein and on or about April 23, 1927, a petition of intervention was filed in this proceeding by Standard Marine Insurance Company, Limited, in which petition it is alleged that on or about July 12, 1924, the said Standard Marine Insurance Company, Limited, issued its open policy of insurance No. 1010, wherein and whereby it insured Louis-Dreyfus & Company against perils of the Lakes and other enumerated perils on grain owned by the said assured or in which the said assured might have an interest. It is further alleged in said petition that the amount of said insurance effective on August 1, 1924, as provided by endorsement attached to said open policy was as follows:

"To cover 'Increased Value' on grain owned by the assured or in which the assured may have an interest, such increased value for the purposes of this insurance to be arrived at by taking the difference between the c.i.f. invoice cost and the highest market value per bushel, plus 5¢ (five cents) as set out in the New York Journal of Commerce between the day of sailing of the vessel at point of shipment, and the day of the final delivery of the complete cargo at destination as named in the certificate, both days inclusive; and in the event of casualty to be valued at the difference between the c.i.f. invoice cost and the highest market value per bushel, plus 5¢ (five cents) as set out in the New York Journal of Commerce between the day of sailing of the vessel at point of shipment and the day the final delivery of the complete cargo would have arrived at destination if casualty had not occurred, both days inclusive."

It is further alleged in said petition that by reason of the total loss of the said cargo the petitioner, Standard Marine

Insurance Company, Limited, paid to the said Louis-Dreyfus & Company the sum of $62,500, the amount of said insurance.

Ninth. That the said policy of insurance issued by Standard Marine Insurance Company, Limited, by its terms constituted insurance only on "Increased Value" in excess of market value which increased value was to be determined in accordance with the terms of the contract of insurance between Standard Marine Insurance Co., Ltd., and Louis-Dreyfus & Co.

[fol. 40] Tenth. That by reason of the payment of your petitioner, Scottish Metropolitan Assurance Company, Limited, to Louis-Dreyfus & Company, of the sum of $284,000 due under its policy, your petitioner has become subrogated to the right of recovery of Louis-Dreyfus & Company in this proceeding to the full extent of its payment to the assured, with interest to date of payment.

Eleventh. That the Standard Marine Insurance Company, Limited, having insured the increased value of the 200,000 bushels of wheat, is entitled to be subrogated to the rights of the assured, Louis-Dreyfus & Company, in the increased value of said wheat in excess of the sum of $284,000 previously insured by the shipper, Canadian Co-Operative Wheat Producers, Limited, with your petitioner, Scottish Metropolitan Assurance Company, Limited.

Wherefore your petitioner prays that this Honorable Court will be pleased to decree that your petitioner, Scottish Metropolitan Assurance Company, Limited, share in any recovery in the above proceeding to the extent of your petitioner's interest as hereinbefore set forth, and for such other and further relief in the premises as may be just and proper.

Bigham, Englar & Jones, Proctors for Petitioner, Scottish Metropolitan Assurance Company, Limited, No. 64 Wall Street, Borough of Manhattan, New York City, N. Y. Day & Day.

Duly sworn to by William L. Day. Jurat omitted in printing.

[fol. 41] IN UNITED STATES DISTRICT COURT

ANSWER OF STANDARD MARINE INSURANCE COMPANY LTD., TO PETITION FOR INTERVENTION—July 25, 1927

The answer of Standard Marine Insurance Company, Ltd., to the petition of Scottish Metropolitan Assurance Company, Limited, intervenor, respectfully alleges on information and belief as follows:

First. It admits the allegations contained in the first article of the petition.

Second. It admits the allegations contained in the second article of the petition, except that for the exact terms and conditions of Scottish Metropolitan Assurance Company, Limited's open policy of marine insurance it refers to the copy of said policy which is "Exhibit C" of the agreed statement of facts in this suit.

Third. It admits the allegations contained in the third article of the petition.

Fourth. It admits the allegations contained in the fourth article of the petition.

Fifth. It admits the allegations contained in the fifth article of the petition.

[fol. 42] Sixth. It admits that by reason of the total loss of the said cargo of wheat, Scottish Metropolitan Assurance Company, Limited, became liable to pay, and on November 3, 1924, did pay to the said Louis-Dreyfus & Company the sum of $284,000, the amount of said insurance. It denies that it has any knowledge or information sufficient to form a belief as to the other allegations contained in the sixth article of the petition.

Seventh. It admits the allegations contained in the seventh article of the petition.

Eighth. It admits the allegations contained in the eighth article of the petition, but for the exact allegations of the petition of intervention of Standard Marine Insurance Company, Ltd., it refers to the original on file in this court in this suit.

Ninth. It denies the allegations contained in the ninth article of the petition, and for the exact terms and provi-

sions of the Standard Marine Insurance Company, Ltd.'s policy of insurance, it refers to a copy thereof which is annexed to the petition of intervention of Standard Marine Insurance Company, Ltd., on file in this court in this suit.

Tenth. It denies the allegations contained in the tenth article of the petition.

Eleventh. It denies that the Standard Marine Insurance Company, Ltd.'s insurance on the 200,000 bushels of wheat is correctly described in the eleventh article of the petition and for the exact terms and conditions of the said policy of insurance it refers to the copy of said policy annexed to the petition of intervention of Standard Marine Insurance Company, Ltd., on file in this court in this suit. It denies that the right of Standard Marine Insurance Company, Ltd., by subrogation is limited as alleged in the eleventh article of the petition.

Twelfth. Further answering as a further defense herein it refers to the amended petition of Standard Marine Insurance Company, Ltd., filed in this court in this case on April 23, 1927, and incorporates the same in this answer and makes it part hereof, and repeats and re-alleges all the allegations contained in said amended petition with the same force and effect as though here set forth at length. [fol. 43] Wherefore your claimant prays that the recovery in the above limitation proceeding, together with interest thereon at the rate of five percent. (5%) per annum from October 29, 1924, insofar as said recovery is applicable to the said 200,000 bushels of wheat, be divided pro rata between the claimant and Scottish Metropolitan Assurance Company, Limited, in proportion to the amount paid by each of them to the said Louis-Dreyfus & Company under their respective policies of insurance referred to in the petition herein.

James M. McSweeney, Guarantee Title Building, Cleveland, Ohio; Duncan & Mount, 27 William Street, New York City, New York, Proctors for Standard Marine Insurance Company, Ltd.

Duly sworn to by Russel T. Mount. Jurat omitted in printing.

[fol. 44] IN UNITED STATES DISTRICT COURT

ORDER REFERRING THE CASE TO WILLIAM B. WOODS, AS SPECIAL COMMISSIONER—April 20, 1927

An order having been entered herein on March 22, 1927, whereby it was ordered that the petition of intervention of Standard Marine Insurance Company, Ltd., be filed in this proceeding, and further ordering that the Columbia Steamship Company, as owner of the steamer Leonard B. Miller, the Hartford Accident & Indemnity Company, its stipulator for value, and Louis Louis-Dreyfus and Charles Louis-Dreyfus, co-partners trading under the firm name and style of Louis-Dreyfus & Company, owners of the cargo on the S/S Glenorchy and claimants herein, and their proctors, Messrs. Day & Day, show cause why an order should not be made herein allowing the said Standard Marine Insurance Company, Ltd., to prosecute its said petition of intervention in these proceedings, and staying the payment of all sums of money in excess of $250,000. by the said Columbia Steamship Company and/or its stipulator for value, to the said Dreyfus & Company and/or their said proctors under the final decree entered in this limitation proceeding, until the final determination of the issues raised by the said petition of intervention, and the motion on said order to show cause having been duly brought on for hearing on April 2, 1927, and James M. McSweeney, appearing in support of said motion, and Messrs. Day & Day, attorneys for Dreyfus & Company having appeared and stated in open Court that they did not oppose the said motion, and no other party appearing in opposition to the said motion, it is now, on motion of James M. McSweeney and Duncan & Mount, proctors for Standard Marine Insurance Company Ltd.,

Ordered:

1. That Standard Marine Insurance Company, Ltd., have leave within 10 days after entry of this order to file an amended petition of intervention in order to correct the statements of amounts in its petition of intervention already filed herein;

2. That Dreyfus & Company have 20 days after service of a copy of this order and a copy of the said amended

petition to file and serve their answer to the said amended petition of intervention;

[fol. 45] 3. That the case be referred to Wm. B. Woods, Cleveland, Esq., as Special Commissioner, to hear the evidence of the parties and report with all convenient speed to the Court, his findings of fact and conclusions of law on the issues raised by the said amended petition and any answers that may be filed thereto.

4. That Scottish Metropolitan Insurance Company, Ltd. have leave to file its petition of intervention in this limitation proceeding, but if Scottish Metropolitan Insurance Company, Ltd., shall file its petition of intervention, it shall also answer the amended petition of Standard Marine Insurance Company, Ltd.

5. That the said Columbia Steamship Company, and the said Hartford Accident & Indemnity Company, be and they hereby are restrained from making any payment under the said final decree of February 15, 1927, to the said Louis Louis-Dreyfus and Charles Louis-Dreyfus, co-partners trading under the firm name and style of Louis-Dreyfus & Company and/or their said proctors in excess of the sum of $250,000. until the hearing and determination of the issues raised by the amended petition of intervention of Standard Marine Insurance Company, Ltd., and the petition of intervention (if filed) of Scottish Metropolitan Insurance Company, Ltd., and the answers that may be filed to the said two petitions and until ten (10) days after the service of an order to be entered on such final determination, with notice of entry thereof, has been made upon the proctors for the Standard Marine Insurance Company, Ltd.

IN UNITED STATES DISTRICT COURT

AGREED STATEMENT OF FACTS

On October 29, 1924, a collision occurred between the S. S. "Glenorchy" and the S. S. "Leonard B. Miller," resulting in the sinking and total loss of the "Glenorchy" and her cargo of 208,392-40/60 bushels of wheat.

Suit was brought by Louis Dreyfus & Co., as owner of the said cargo on the S. S. "Glenorchy" against the "Leonard B. Miller," and thereafter a petition for limi-
[fol. 46] tation of liability was filed in this Court by Columbia Steamship Co., as owner of the "Leonard B. Miller." Claim was filed in this limitation proceeding by Louis Dreyfus & Co., for a recovery of their damages for the loss of the wheat aforesaid. After trial, both the "Miller" and "Glenorchy" were held at fault, and Louis Dreyfus & Co. was allowed a full recovery. The amount of Louis Dreyfus & Co.'s damages was fixed by agreement at $322,487.55, with interest thereon at 5% per annum from October 29, 1924.

After entry of final decree in the limitation proceedings, a petition of intervention was filed by Standard Marine Insurance Co., Ltd., "intervening for its interest, by subrogated rights, in the fund in court in the above entitled cause, represented by the bond or stipulation for value of the S. S. 'Leonard B. Miller.'" Thereafter a petition of intervention was filed by Scottish Metropolitan Assurance Co., Ltd., intervening for its interest, by way of subrogation, in the said recovery.

The facts are as follows:

Under contract dated August 25, 1924, Louis Dreyfus & Co. purchased from the Canadian Co-operative Wheat Producers, Ltd., 200,000 bushels Manitoba No. 2 Northern Wheat for future delivery at Montreal, on C.I.F. terms as appears from invoices dated October 28, 1924, being Exhibits A and B annexed hereto and made a part hereof. Thereafter on October 27, 1924, the Canadian Co-operative Wheat Producers, Ltd. shipped the 200,000 bushels of wheat on the S. S. "Glenorchy" for delivery at Montreal.

The C.I.F. invoice price is stated in the said invoices as $1.38½ per bushel, being a total of $138,500. for each invoice, and a total for the entire shipment of $277,000. The notations at the foot of the invoices indicate that the 100,000 bushels of wheat covered by each invoice were insured by the shipper at $142,000. or a total of $284,000. for the 200,000 bushels.

The grain in question was shipped by Canadian Co-operative Wheat Producers, Ltd. on the S.S. "Glenorchy" on October 27, 1924, and constituted the greater part of

that vessel's cargo. This grain became a total loss as a result of the collision which occurred on October 29, 1924.

The insurance referred to in the invoices was effected by the Canadian Cooperative Wheat Producers, Ltd. with the Scottish Metropolitan Assurance Co., Ltd., under an [fol. 47] open policy, No. L100023, dated February 22,1924, which was originally issued to Alberta Cooperative Wheat Producers, Ltd., but which, on September 10, 1924, was endorsed over with consent of said Alberta Wheat Producers, Ltd. and the said Scottish Metropolitan Assurance Co., Ltd. to the Canadian Cooperative Wheat Producers, Ltd., a true and correct copy of which policy is hereto annexed and marked Exhibit "C" and is made a part hereof.

On the 26th day of October, 1924, two certificates of insurance were issued by the Scottish Metropolitan Assurance Company, Ltd., under said policy No. L 100023, to the Canadian Cooperative Wheat Producers, Ltd., said certificates being numbered A 15017 and A 15018, respectively (Exhibits "D" and "E") and are made a part hereof.

On or about July 12, 1924, the Standard Marine Insurance Co., Ltd., issued to Louis Dreyfus & Co. its open policy of marine insurance No. 1010. A true and correct copy of said policy of Standard Marine Insurance Co., Ltd., is annexed to the petition of intervention of said Standard Marine Insurance Co., Ltd., and said policy is made a part hereof.

Thereafter Louis Dreyfus & Company, through their brokers, R. F. Murray & Bro., Inc., made a declaration to the Standard Marine Insurance Company, Ltd., under open policy No. 1010, covering the shipment in question, by letter dated October 30, 1924, supplemented by detail statement dated October 31, 1924. No certificate was issued by Standard Marine Insurance Company, Ltd., covering this shipment. True and correct copies of said letter of October 30, 1924 and said statement of October 31, 1924, are hereto annexed, marked Exhibits F and G respectively and are made a part hereof.

On November 3rd, 1924, Scottish Metropolitan Assurance Co., Ltd., paid Louis Dreyfus & Co. the sum of $284,000. which amount was in fact due from Scottish Metropolitan Insurance Co. to Dreyfus & Co. This payment was made on said Certificates of Insurance No. A15017 and A15018, covering the grain which had been insured under

open policy No. L 100023 of the Scottish Metropolitan Assurance Co., Ltd., issued to the Canadian Cooperative Wheat Producers, Ltd., which certificates had in due course been endorsed to Louis Dreyfus & Co.

After the loss, Louis Dreyfus & Co. made claim against the Standard Marine Insurance Co., Ltd., for $62,500., as per Exhibit G hereto annexed.

[fol. 48] The said amount of $62,500. was in fact due from Standard Marine Insurance Co., Ltd. to Dreyfus & Co. under the said policy and was paid by the Standard Marine Insurance Co., Ltd., to Louis Dreyfus & Co. on November 28, 1924.

The decree of the District Court in the limitation proceedings, in favor of Louis Dreyfus & Co. is in the amount of $322,487.65 with interest at 5% per annum from October 29, 1924. The recovery awarded to Louis Dreyfus & Co. is computed upon the actual value at port of loading on the total shipment of 208,392-40/60 bushels of wheat, which value was fixed by agreement at $1.54¾ per bushel.

The actual value at port of loading of the 200,000 bushels of wheat referred to above has been fixed in the final decree in the limitation proceedings, at $1.54¾ per bushel or at a total value of $309,500.

This stipulation is intended by the parties to be solely a stipulation of fact, without prejudice to the contentions of the respective parties as to the legal effect of such facts.

Duncan & Mount, Proctors for Standard Marine Insurance Co., Ltd. Bigham, Englar & Jones, Proctors for Louis Dreyfus & Co. and Scottish Metropolitan Assurance Co., Ltd.

EXHIBIT "A."

[A]lberta]* Canadian Co-operative Wheat Producers Limited

No. —

Grain Exchange

Winnipeg, Can., October 28th, 1924.

M Messrs. L. Dreyfus & Company, New York, N. Y.:

Contract August 25, 1924. No. 1.

Shipped for your a/c and risk per S/S "Glenorchy," [fol. 49] from Fort William to Montreal, Que., 100,000.00 bushels Manitoba 2 Northern Wheat @ $1.38½ per bushel $138,500.00

C. I. F.

Documents attached to Demand draft through the Canadian Bank of Commerce.

Payment in Canadian Funds.

(Achat 414.)

$138,500.00

Bs/L Dated October 26th, 1924. E. & O. E.

Bushels	Insurance certificate No.	Amount of insurance
100,000.00	A 15018	$142,000.00

EXHIBIT "B"

[Alberta]* Canadian Co-operative Wheat Producers, Limited

No. —

Grain Exchange

Winnipeg, Can., October 28th, 1924.

M Messrs. L. Dreyfus & Company, New York, N. Y.:

Contract August 25, 1924. No. 2.

Shipped for your a/c and risk per S/S "Glenorchy" from Fort William to Montreal, Que., 100,000.00 bushels

[* Erased in copy.]

of Manitoba 2 Northern Wheat @ $1.38½ per bushel $138,500.00

C. I. F.

Documents attached to demand Draft through the [Bank of Manitoba]* Canadian Bank of Commerce.

Payment in Canadian Funds.

(Achat 415.)

$138,500.00

Bs/L Dated October 26th, 1924. E. & O. E.

Bushels	Insurance certificate No.	Amount of insurance
100,000	A 15017	$142,000.00

[fol. 50] EXHIBIT "C"

Copy

Lake Contract No. L. 100023

Scottish Metropolitan Assurance Company, Limited, of Edinburgh, Scotland

E. W. Schauffler, Marine Underwriter, 18 Wellington Street East, Toronto, Ontario

Canadian Marine Branch

The Assurers not to be liable under this policy for more than $— by any one vessel or in any one place, at one time, unless otherwise agreed upon at the time of endorsement.

Alberta Co-Operative Wheat Producers, Limited, on account of Whom it may concern.

Loss, if any, payable to as per form attached.

Do Make Insurance, and cause to be insured, lost or not lost, at and from as per form attached.

The Assurers are to be entitled to premium at their usual rates on all shipments reported or not. It is warranted by

[* Erased in copy.]

the Assured to report every shipment on the day of receiving advice thereof, or as soon thereafter as may be practicable, when the rate of premium shall be fixed by the Assurers. Premium payable monthly in cash.

The said goods and merchandise hereby insured are valued (premium included) at as per form attached.

Beginning the adventure upon the said goods from and immediately following the loading thereof on said vessel at as per form, as aforesaid, and so shall continue and endure until the same shall arrive and be safely landed at the port of destination, but not to exceed forty-eight hours after the time of arrival.

Touching the adventures and perils which the said Assurers are contented to bear and take upon themselves they are of the Lakes, Rivers, Fires, Jettisons, and all other perils and misfortunes that have or shall come to the hurt, detriment or damage of the said goods, or any part thereof, excepting all perils, losses or misfortunes arising from the want of ordinary care and skill in loading and stowing the cargo of, or in navigating the said vessel, from theft, barratry or robbery, or other legally excluded causes. And in case of loss or misfortune, it shall be lawful and necessary [fol. 51] to and for the insured, or insurers, their agents, factors, servants and assigns, to sue, labor and travel for, in and about the defence, safeguard and recovery of the said goods or any part thereof, and to proceed against common carriers or bailees, who are or may be liable, without prejudice to this insurance; nor shall the acts of the insured or insurers, in recovering, saving and preserving the said goods, in case of disaster, or in such process be considered a waiver or an acceptance of abandonment, nor as affirming or denying any liability, under this Policy, but such acts shall be considered as done for the benefit of all concerned, without prejudice to the rights of either party. To the charges whereof the said Assurers will contribute in such proportion as the sum herein insured bears to the whole value of the goods so insured.

And in case of loss, such loss to be paid in thirty days after proof of loss and proof of interest in said goods, are furnished these Assurers. Provided Always, and it is hereby further agreed, that if the said Insured shall have made any other insurance upon the goods aforesaid, prior in day of date to this Policy, then the said Assurers shall

be answerable only for so much as the amount of such prior insurance may be deficient towards fully covering the goods hereby insured; and the said Assurers shall return the premium upon so much of the sum by them insured, as they shall be by such prior insurance exonerated from. And in case of any insurance upon the said goods subsequent in date to this Policy, the said Assurers shall nevertheless be anwerable for the full extent of the sum by them insured, without right to claim contribution from such subsequent insurers, and shall accordingly be entitled to retain the premium by them received, in the same manner as if no such subsequent insurance had been made. Other insurance upon the goods aforesaid, of date the same day as this Policy, shall be deemed simultaneous herewith; and the said Assurers shall not be liable for more than a ratable contribution in the proportion of the sum by them insured to the aggregate of such simultaneous insurance. It Is Also Agreed, that the property be warranted by the Assured, free from any charge, damage or loss, which may arise in consequence of a seizure or detention for or on account of any illicit or prohibited trade, or any trade in articles contraband of war. And in case of loss to the goods hereby insured, these Assurers, their agent or repre-
[fol. 52] sentative, at or nearest the first port of discharge, shall have prompt notice of same, and shall have every opportunity and facility for ascertaining the cause, extent and amount of loss. It Is Furthermore Hereby Expressly Provided that no suit or action against these Assurers, for the recovery of any claim for loss or damage upon, under or by virtue of this Policy shall be sustained in any Court of Law or Equity; unless such suit or action shall be commenced within the term of twelve months next after the loss or damage shall occur; and in case any such suit or action shall be commenced, after the expiration of twelve months next after such loss or damage shall have occurred, the lapse of time shall be taken and deemed as conclusive evidence and a conclusive defence against the validity of the claim thereby so attempted to be enforced.

This insurance warranted to be in all cases null and void as concerns loss or damage from fire on land to the extent of any fire insurance directly or indirectly covering upon the same property, whether prior or subsequent hereto in date, and it is also understood and agreed, that in case any

agreement be made or accepted by the Assured with any carrier by which it is stipulated that such or any carrier shall have, in case of any loss for which he may be liable, the benefit of this insurance, or exemption in any manner from responsibility grounded on the fact of this insurance, then and in that event the Insurers shall be discharged of any liability for such loss hereunder, but this Policy in these and all cases of loss or damage by perils insured against shall be liable and owe actual payment for (only) what cannot be collected from carrier and/or bailees and/or fire insurers of properly lost or damaged, as before stated, but in case of final failure to collect from carrier and/or bailees and/or fire insurers, this Policy shall be duly liable, provided always, the loss shall constitute in other respects a claim under this insurance, and in the event of loss or damage, this Policy shall be null and void to the extent of any payment made by any carrier or bailee, liable or not, or any payment made by any party in purchase of a claim hereunder, any assignment whatever given by the assured to the contrary notwithstanding.

It is also understood and agreed, that in case of loss or damage under this Policy, the Assured in accepting payment therefor, thereby and by that act assigns and transfers to these Assurers, all his right or their right to claim for loss or damage, as against the carrier or any Person or [fol. 53] Persons, Corporation or Corporations, to inure to their benefit, however, to the extent only of the amount of the loss or damage and attendant expenses of recovery, paid or incurred by the said Assurers and any act of the Insured, waiving or transferring or tending to defeat or decrease any such claim against such carrier or any person or persons, corporation or corporations, whether before or after the insurance was made under this Policy, Shall Be a cancellation of the liability of these Assurers, for or on account of the risk insured for which loss is claimed.

And it is understood and agreed, that these Assurers or their Agent shall have free access at all reasonable hours to the books, accounts, instructions and correspondence of the Assured, containing statements of, or which relate to shipments and receipts covered by this Policy. This Policy may be declared void by either party on giving a written

notice to that effect to the other party, but without prejudice to any risk then pending.

Deck Cargoes.—It is understood that goods or merchandise covered by this Policy shall be under deck, unless otherwise specified, and an additional premium paid; and deck cargoes are insured against total loss of packages only; the minimum amount of such loss to make a claim shall be Ten per cent., except salt, which shall be Twenty per cent. of the whole number of packages insured on deck; and in all cases on deck risks to be free from loss by wet, leakage, breakage or exposure.

Warranted by the Assured free from claim on account of riot or other civil commotion, capture, seizure, detention or destruction, by or arising from any belligerent nation, or by or from any officer, civil or miltary, or other person claiming to act in their name or under their authority, or in their behalf.

Warranted by the Insured free from any damage or injury from dampness or frost, heating, sweating, steaming, change of flavor, or being spotted, discolored, musty or mouldy, except caused by actual water contact with the article damaged, and to be free from liability for leakage of molasses or other liquids, or breakage of articles liable to break from their own nature, unless occasioned by the perils insured against. In case of loss or injury to any part of a machine consisting when complete, for sale, or use, of several parts, the Insurers shall only be liable for the insured value of the part lost or damaged.

[fol. 54] N. B.—This Policy is subject to the usages and regulations of the Great Lakes, as to all matters of adjustment and settlement of losses and averages not herein specified and provided for, and the adjustment of any loss hereunder shall be made by a competent adjuster of marine losses, who shall be designated by the Insurers, but no partial loss or particular average to be paid unless amounting to Five per cent.

It is understood and agreed, as one of the conditions under which this Policy is issued and endorsements made thereon, that if the insurance is procured by any person or persons other than the Assured, they shall be deemed the agent or agents of the Assured and not of these As-

surers in any and all transactions relating to this insurance.

If the voyage aforesaid shall have begun, and shall have terminated before the date of this Policy, then there shall be no return of premium on account of such termination.

In witness whereof the undersigned on behalf of the said Company has hereunto subscribed his name, in the City of Toronto, this 22nd day of February, 1924.

Countersigned? E. W. Schauffler, Marine Underwriter.

Copy

May 19th, 1924.

Endorsement to be Attached to and Made Part of Policy No. L100023 of the Scottish Metropolitan Assurance Company, Limited, Issued to Alberta Co-Operative Wheat Producers Limited, on Grain, etc., Covering Against as per Policy.

It is understood and agreed that as of all steamers sailing on and after this date these assurers are not to be liable for more than Seven Hundred and Fifty Thousand $750,000 Dollars per any one steel steamer at any one time unless otherwise agreed upon at time of endorsement.

All other terms and conditions remaining unchanged.

[fol. 55]

Copy

Sept. 10th, 1924.

Endorsement to be Attached to and Made Part of Policy No. L. 100,023 of the Scottish Metropolitan Assurance Company, Limited, Issued to Alberta Co-operative Wheat Producers Limited, on Grain, etc., Covering Against as per Policy

The interest in this policy is now vested in Canadian Co-Operative Wheat Products Limited and not as written.

All other terms and conditions remaining unchanged.

Copy

Toronto, Ontario, Oct. 9th, 1924.

Endorsement to be Attached to and Made Part of Policy No. L. 100,023 of the Scottish Metropolitan Assurance Company, Limited, Issued to Canadian Co-Operative Wheat Producers Limited, on Grain, etc., Covering Against as per Policy

It is understood and agred that as of October 8th, 1924, Clause No. 3 of this policy is deleted and replaced by the following:

"To cover 100% interest in all shipments of grain and/or flaxseed and/or cereals and/or maize, their own, or in which they may have an insurable interest, or the property of others which they may receive instructions to insure, such instructions being mailed or given the Canadian Co-Operative Wheat Producers Limited, in writing, prior to shipment and before any known or reported loss or accident."

All other terms and conditions remaining unchanged.

Copy

Oct. 20th, 1924.

Endorsement to be Attached to and Made Part of Policy No. L. 100,023 of the Scottish Metropolitan Assurance Company, Limited, Issued to Canadian Co-operative Wheat Producers Limited, on Grain, etc., Covering Against as per Policy.

It is understood and agreed that as of all steamers sailing on and after this date these assurers are not to be liable for more than Nine Hundred Thousand ($900,000) Dol. [fol. 56] lars per any one steel steamer at any one time unless otherwise agreed upon at time of endorsement.

All other terms and conditions remaining unchanged.

Copy

March 7th, 1927.

Endorsement to be Attached to and Made Part of Policy No. L. 100,023 of the Scottish Metropolitan Assurance Company, Limited, Issued to Alberta Co-operative Wheat Producers, Limited, on Grain, etc., Covering Against as per Policy

It is understood and agreed that as from inception Clause No. 3 of the form attached to this policy is amended to read and cover as follows:

"To cover on shipments of grain and/or flaxseed and/or cereals and/or maize, made by or for account of Albert Co-Operative Wheat Producers Limited, in which they have an insurable interest, or which they may have instructions to insure, and provided they declare to these assurers or to Johnson & Higgins of Ill., Inc., 175 West Jackson Blvd., Chicago, Illinois, by mail or telegraph prior to sailing of vessel or occurrence of loss, their intention to insure such cargo under this policy and also indicate the probable amount of insurance required, and the vessel's name. The assured to issue certificates for not exceeding the amount declared for these shipments on forms furnished by this Company, two (2) copies of each certificate to be mailed on date of issue, or as soon thereafter as practicable, to Johnson & Higgins of Ill. Inc., for transmission to this Company. Certificates in all cases to be issued prior to sailing of vessel or not later than forty-eight (48) hours thereafter."

All other terms and conditions remaining unchanged.

Alberta Co-operative Wheat Producers Limited

1. For account of whom it may concern.

2. Loss if any, payable to the Assured or their order as per certificates of insurance issued hereunder.

3. To cover all shipments of grain and/or flaxseed and/or cereals and/or maize for which Alberta Co-Operative Wheat [fol. 57] Producers, Limited, may issue the certificates of the assurers hereunder, advices of all such shipments to be mailed to Messrs. Johnson & Higgins of Illinois, Inc.,

Insurance Exchange, Chicago, Ill., on day of issue of such certificates and before known loss, but held covered reported or not reported provided same be communicated to assurers as soon as known to the assured and deficiency of premium made good.

This policy attaches and covers 100% of all shipments made as above.

4. Valued, premium included, at amount of invoice including all charges in the invoice and including prepaid or advanced or guaranteed freight, if any, plus Ten Percent unless otherwise agreed upon prior to shipment.

5. Per steamer and/or steamers and/or vessel or vessels, in tow or otherwise.

6. To be insured at and from port or ports on the Great Lakes to other port or ports on the Great Lakes, including to Montreal and/or Quebec and commencing with shipments made after the opening of the 1924 navigation season and to continue up to and including April 15th, 1925, as provided in the tariff of rates.

7. Including the risks of vessel storage, as may be required, prior to, during, or following the navigation season, either at port of shipment, port of discharge, or at intermediate ports. Where vessel storage is covered at port of shipment this insurance also covers the delivery trip at the next opening of navigation.

8. It is understood and agreed that merchandise insured under this policy is held covered until discharged from the vessel at destination, it being warranted that the assured will declare to this Company all shipments not discharged within a period of seventy-two hours after arrival as soon thereafter as practicable and pay an additional premium at the rate provided in the tariff.

9. It is understood and agreed as forming part of the conditions of this policy that shipments are to be covered hereunder as soon as laden on the vessel.

10. Average payable irrespective of percentage.

11. It is specifically understood and agreed that risks on grain while in elevators are in no case to be covered hereunder.

[fol. 58] 12. At the request of the assured, it is agreed that certificates issued under this policy shall cover against all damage resulting from "faults or errors in navigation or in the management of the vessels" from which vessels and their owners, agents or charterers are relieved of responsibility by the clause in Section 3 of the so-called Harter Act, from which the above quoted words are literally extracted, but nothing in this agreement shall be construed to render the assurers liable under any circumstances for any loss or damage due to the vice propre of the grain itself.

13. Permission to tow or to be towed.

14. Liberties as per Contract of Affreightment; the presence of the negligence clause and/or latent defect clause in the bills of lading and/or charter party and/or Contract of Affreightment, as between the assured and the assurer shall not prejudice this insurance.

15. Held covered at a premium to be arranged in case of deviation or change of voyage or from variation of the risk by reason of the exercise of any liberty granted to the shipowner or charterer under the contract of affreightment or of any omission or error in the description of the interest, vessel, or voyage, the assured to report such deviations and/or variations to these assurers as soon as practicable after they have knowledge thereof.

16. These assurers not to be liable for more than $600,000 per any one steamer or $400,000 per any one barge at one time unless otherwise agreed upon at the time of endorsement.

17. This policy covers in United States or Canadian Currency at the option of the assured provided either is endorsed on the certificate at the time of issue and in the absence of such endorsation on the certificate it is further understood and agreed that such certificates shall cover in Canadian Currency only.

18. Rates as per schedule attached.

19. It is agreed that the clauses contained in this rider shall be considered to supersede and annul any clauses to the same or similar effect and any clauses or conditions or practices to a contrary effect which may be printed in or previously attached to this policy, or which might otherwise be construed to govern or effect this insurance; and for the

[fol. 59] purposes of construction these clauses shall be deemed of the nature of written additions to the policy.

Attached to and forming part of Policy No. L100,023 of the Scottish Metropolitan Assurance Company, Limited.

Rates on Grain by Steel Steamers Classed I for Grain by American Bureau of Shipping, Great Lakes Department, from Fort William and/or Port Arthur

To	Lake Erie & Georgian Bay	Montreal direct or transshipped
April 16th, to Nov. 30	10¢	20¢
Dec. 1st to Dec. 5th	3/8%	
Dec. 6th to Dec. 9th	1/2%	
Dec. 10th to Dec. 12th	70¢	
Dec. 13th to Dec. 15th	1%	

Storage Risk at Port of Shipment

Before opening of navigation (and during season of navigation when required).

Storage Risk at Port of Destination

After close of navigation (and during season of navigation when required).

At rates of 1/3¢% per day or 10¢% per month.

Note.—Steel vessels classed 100 AI British Lloyds without restriction or equivalent classification to be considered the same as vessels classed 1 for grain by American Bureau of Shipping Great Lakes Department.

Exhibit "D"

Lake Grain

Certificate of Insurance

Scottish Metropolitan Assurance Company, Limited, of Edinburgh, Scotland

E. W. Schauffler, Marine Underwriter, 18 Wellington Street East, Toronto, Ontario

$142,000.00. No. A15017

Original

[fol. 60] Winnipeg, Manitoba, October 28th, 1924.

This is to certify that on the twenty-sixth day of October, 1924, we, the undersigned, insured under Policy No. L.

100,023 for Canadian Co-operative Wheat Producers, Limited, the sum of One hundred and forty-two thousand Dollars, on 100,000.00 bushels of Manitoba 2 Northern Wheat. Valued at $1.42 per bushel. Shipped on board of the Steamer "Glenorchy" at and from Fort William and/or Port Arthur, to Montreal via Port Colborne. Loss, if any, payable to the order of Canadian Bank of Commerce on presentation of this Certificate, and said loss to be adjusted with holder hereof, in conformity with the conditions of said Policy.

In case of loss or damage, consignee or holders of this Certificate are requested to give immediate notice to Johnson & Higgins of Illinois, Inc., Insurance Exchange, Chicago, Illinois.

This Certificate is not valid unless countersigned by Canadian Co-operative Wheat Producers, Limited.

E. W. Schauffler, Marine Underwriter.

Countersigned by Canadian Co-operative Wheat Producers Ltd. D. O. Stewart.

Held covered until discharged from vessel for a period not exceeding eighteen days after arrival. After seventy-two (72) hours an additional premium to be charged, pro rata of the fifteen (15) day tariff rate, to the original holder of certificate.

At the request of the assured, it is agreed that this certificate shall cover against all "damage resulting from faults or errors in navigation or in the management of the vessels," from which vessels and their owners, agents, or charterers are relieved of responsibility by the clause in Section 3 of the so-called Harter Act from which the above quoted words are literally extracted, but nothing in this agreement shall be construed to render the assurers liable under any circumstances for any loss or damage due to the vice propre of the grain itself; other conditions remaining unchanged. [fol. 61] With leave to tow and to be towed.

The five per cent. clause in the policies referred to in this certificate is hereby waived as per tariff conditions, unless this clause is crossed out by shipper.

It is agreed that in consideration of insurers paying to the assured, or owner of carrying vessel, any claims hereunder for general average contribution without surrender

of this certificate, the assured, their agents or assigns and/or the holders of this certificate guarantee these insurers against any further demand for same claim.

Held covered in case of deviation or change of voyage.

Endorsed on back: The Canadian Bank of Commerce New York. D. E. Younger, Agent. p. p. Louis-Dreyfus & Co., L. L.-Dreyfus.

Exhibit "E"

Lake Grain

Certificate of Insurance

Scottish Metropolitan Assurance Company, Limited, of Edinburgh, Scotland

E. W. Schauffler, Marine Underwriter, 18 Wellington Street East, Toronto, Ontario

$142,000.00. No. A15018

Original

Winnipeg, Manitoba, October 28th, 1924.

This is to Certify that on the twenty-sixth day of October, 1924, we, the undersigned, insured under Policy No. L. 100,023 for Canadian Co-operative Wheat Producers, Limited, the sum of One hundred and forty-two thousand Dollars, on 100,000.00 bushels of Manitoba 2 Northern Wheat. Valued at $1.42 per bushel. Shipped on board of the Steamer "Glenorchy" at and from Fort William and/or Port Arthur, to Montreal via Port Colborne. Loss, if any, payable to the order of Canadian Bank of Commerce on [fol. 62] presentation of this Certificate, and said loss to be adjusted with holder hereof, in conformity with the conditions of said Policy.

In case of loss or damage, consignees or holders of this Certificate are requested to give immediate notice to John-

son & Higgins of Illinois, Inc., Insurance Exchange, Chicago, Illinois.

This Certificate is not valid unless countersigned by Canadian Co-operative Wheat Producers, Limited.

E. W. Schauffler, Marine Underwriter.

Countersigned by Canadian Co-operative Wheat Producers, Ltd. D. O. Stewart.

Held covered until discharged from vessel for a period not exceeding eighteen days after arirval. After seventy-two (72) hours an additional premium to be charged pro rata of the fifteen (15) day tariff rate, to the original holder of certificate.

At the request of the assured, it is agreed that this certificate shall cover against all "damage resulting from faults or errors in navigation or in the management of the vessels," from which vessels and their owners, agents, or charterers are relieved of responsibility by the clause in Section 3 of the so-called Harter Act from which the above quoted words are literally extracted, but nothing in this agreement shall be construed to render the assurers liable under any circumstances for any loss or damage due to the vice propre of the grain itself; other conditions remaining unchanged.

With leave to tow and to be towed.

The five per cent. clause in the policies referred to in this certificate is hereby waived as per tariff conditions, unless this clause is crossed out by shipper.

It is agreed that in consideration of insurers paying to the assured, or owner of carrying vessel, any claims hereunder for general average contribution without surrender of this certificate, the assured, their agents or assigns and/or the holders of this certificate guarantee these insurers against any further demand for same claim.

[fol. 63] Held covered in case of deviation or change of voyage.

Endorsed on back: The Canadian Bank of Commerce New York. D. E. Younger, Agent. p. p. Louis Dreyfus & Co., L. L. Dreyfus.

EXHIBIT "F"

R. F. Murray & Bro. Inc., Insurance, N. Y. Produce Exchange Building, No. 8 Broadway

New York City, October 30, 1924.

Toronto Insurance & Vessel Agency, Toronto, Canada.

GENTLEMEN:

Re Louis Dreyfus & Co., s/s Glenorchy, Order No. 170

Our assured has just received telegraphic advices from their Winnipeg Office, dated October 29th, reading as follows:

"Glenorchy which left Fort William October twenty-seventh sank this afternoon collision with L. B. Miller."

As soon as we receive further information in connection with this loss, we will advise you. As this steamer sailed on the 27th of October with shipment of grain for Montreal, we are figuring the number of days for this voyage to be ten days, and insured value under our Assured's Open Policy will be figured on the basis of the highest C.I.F. Montreal quotation during the ten days from October 27, to which, of course, is added 5¢ as provided for in the policy.

As soon as the number of days elapse, we will forward you a statement showing the exact number of bushels [fol. 64] shipped, with all other details and in the meantime would appreciate your prompt acknowledgment of this notice.

Yours very truly, R. F. Murray & Bro. Inc. G. E. Woodhouse.

GEW:WK.

EXHIBIT "G"

Louis Dreyfus & Co., Produce Exchange Building, New York

Oct. 31st, 1924.

Debit note for Messrs. R. F. Murray & Bro. Inc., New York, N. Y.

Lake Steamer Glenorchy (A. 414-415).

Binder No. D 170. No. 2 Nor. Man.

Highest market value on Oct. 27th $1.64¾ per bushel plus 5¢	$1.69¾
CIF Invoice value per bushel	1.38½
Increased value per bushel	$.31¼
10/26 Loaded at Ft. William	174,000 bus.
10/26 Loaded at Pt. Arthur	26,000 bus.
10/26 Total loaded	200,000 bus.

Lake Steamer Glenorchy sank on October 29th, being a total loss, 200,000 bushels, at $.31¼ per bushel, $62,500.00.

[fol. 65] In United States District Court

Report of Special Commissioner—Filed Jan. 14, 1928

To the Honorable Judges of the District Court of the United States for the Northern District of Ohio, Eastern Division:

In pursuance to the decretal order made and entered in this cause, and bearing date of April 20, 1927, at a stated term of this Court held in the City of Cleveland in said district by which it was referred to Wm. R. Woods, Esq., as Special Commissioner, to hear the evidence of the parties and report with all convenient speed to this Court his findings of fact and conclusions of law on the issues raised on the amended petition of the Standard Marine Insurance Company, Ltd. and any answers that might be filed thereto; and,

The Scottish Metropolitan Assurance Company, Ltd. having thereafter filed its petition and also filed its answer to the amended petition of the Standard Marine Insurance Company, Ltd., and the Standard Marine Insurance Company, Ltd. having filed its answer to the petition of the Scottish Metropolitan Assurance Company, Ltd., the cause came on for hearing on the issues made up from said pleadings; and,

I, Wm. B. Woods, as Special Commissioner of said Court, do respectfully report that I have proceeded to investigate

the matters so referred to me, that I have been attended by the parties and their respective counsel in said controversy, and that I find and report as follows:

Findings of Fact

(1) The issues in this case concern the distribution of money paid by the two insurance companies to Louis Dreyfus & Company for the loss of a cargo of wheat, which, on October 27, 1924, was shipped on the S. S. "Glenorchy." On October 29, 1924, a collision occurred between the S. S. "Glenorchy" and the S. S. "Leonard B. Miller," resulting in the sinking and total loss of the "Glenorchy" and her cargo of 208,392-40/60 bushels of wheat.

(2) Suit was brought by Louis Dreyfus & Company, as owner of the said cargo on the S. S. "Glenorchy" against the "Leonard B. Miller," and thereafter a petition for limitation of liability was filed in this Court by Columbia Steamship Company, as owner of the "Leonard B. Miller." [fol. 66] Claim was filed in this limitation proceeding by Louis Dreyfus & Company, for a recovery of its damages for the loss of the wheat aforesaid. After trial, both the "Miller" and the "Glenorchy" were held at fault, and Louis Dreyfus & Company was allowed a full recovery. The amount of Louis Dreyfus & Company's damages was fixed by agreement at $322,487.55, with interest thereon at 5% per annum from October 29, 1924.

(3) Stated in a general way, the present controversy began when the one as to liability ended. After entry of final decree in the limitation proceedings, a petition of intervention was filed by Standard Marine Insurance Company, Ltd., "intervening for its interest, by subrogated rights, in the fund in Court in the above entitled cause, represented by the bond or stipulation for value of the S. S. 'Leonard B. Miller'." Thereafter a petition of intervention was filed by Scottish Metropolitan Assurance Company, Ltd., intervening for its interest, by way of subrogation, in the said recovery.

(4) Under contract dated August 25, 1924, Louis Dreyfus & Company purchased from the Canadian Cooperative Wheat Producers, Ltd., 200,000 bushels Manitoba No. 2 Northern Wheat for future delivery at Montreal, on C.I.F.

terms as appears from invoices dated October 28, 1924, being Exhibits A and B. Thereafter on October 27, 1924, the Canadian Co-operative Wheat Producers, Ltd., shipped the 200,000 bushels of wheat on the S. S. "Glenorchy" for delivery at Montreal.

(5) The C.I.F. invoice price is stated in the said invoices as $1.38½ per bu., being a total of $138,500 for each invoice, and a total for the entire shipment of $277,000. The notations at the foot of the invoices indicate that the 100,000 bu. of wheat covered by each invoice were insured by the shipper at $142,000 or a total of $284,000 for the 200,000 bushels.

(6) The grain in question, which was shipped by Canadian Co-operative Wheat Producers, Ltd., on the S. S. "Glenorchy" on October 27, 1924, constituted the greater part of that vessel's cargo and became a total loss in the collision on October 29, 1924.

(7) The insurance was effected by the shipper with the Scottish Metropolitan Assurance Company, Ltd., under its open policy No. L-100,023, dated February 22, 1924, to the [fol. 67] Alberta Co-operative Wheat Producers, Ltd., which on September 10, 1924, was regularly endorsed with consent of the said insurance company to the Canadian Co-operative Wheat Producers, Ltd. On October 26, 1924, two certificates of insurance were issued by the Scottish Metropolitan policy covering the 200,000 bu. of wheat valued at $1.42 per bu. shipped on the S. S. "Glenorchy."

(8) The provisions of the Scottish Metropolitan Assurance Company policy which are concerned in this controversy are as follows:

(Scottish Policy A.) "To cover 100% interest in all shipments of grain and/or flaxseed and/or cereals and/or maize, their own, or in which they may have an insurable interest, or the property of others which they may receive instructions to insure, such instructions being mailed or given the Canadian Co-operative Wheat Producers Limited, in writing, prior to shipment and before any known or reported loss or accident."

"Valued, premium included, at amount of invoice including all charges in the invoice and including prepaid

or advanced or guaranteed freight, if any, plus Ten Percent unless otherwise agreed upon prior to shipment."

(Scottish Policy B.) "It is also understood and agreed that in case of loss or damage under this policy the assured in accepting payment therefor thereby by that act assigns and transfers to these assurers all his right or their right to claim for los sor damage, as against the carrier or any person or persons, corporation or corporations to inure to their benefit, however, to the extent only of the amount of the loss or damage and attendant expenses of recovery pair in incurred by the said assurers, and any act of the insured, waiving or transferring or tending to defeat or decrease any such claim against such carrier or any person or persons, corporation or corporations whether before or after the insurance was made under this policy shall be a cancellation of the liability of these assurers, for or on account of the risk insured for which loss is claimed."

(9) The Standard Marine Insurance Company, Ltd., on July 12, 1924, issued to Louis Dreyfus & Company, [fol. 68] its open policy of marine insurance No. 1010. The provisions of the Standard Marine Insurance Company policy, which are concerned in this controversy are as follows:

(Standard Policy A, Rider of Aug. 1, 1924.) "To cover 'Increased Value' on grain owned by the Assured or in which the Assured may have an interest, such 'Increased value' for the purposes of this insurance, to be arrived at by taking the difference between the C.I.F. invoice cost and the highest market value per bushel, plus 5¢ (Five cents), as set out in the 'New York Journal of Commerce' between the day of sailing of the vessel at point of shipment, and the day of the final delivery of the complete cargo at destination as named in the Certificates, both days inclusive; and in the event of casualty, to be valued at the difference between the C.I.F. invoice cost and the highest market value per bushel, plus 5¢ (Five cents) as set out in the 'New York Journal of Commerce' between the day of sailing of the vessel at point of shipment, and the day the final delivery of the complete cargo would have arrived at destination if casualty had not occurred, both days inclusive. Advice of all such shipments to be mailed to the Company, 64

King Street East, Toronto, Ontario, Canada, by registered letter on day of sailing of the vessel, or as soon thereafter as practicable."

(Standard Policy B.) "To cover all shipments of grain owned by the assured or in which the assured may have an interest and not insured by the shipper, such shipments to be valued, for the purposes of this insurance, at amount declared, such amount declared and advices of such shipment to be mailed to the company, 64 King Street, East Toronto, Ontario, Canada, by registered mail prior to sailing of the vessel."

(Standard Policy C.) "Warranted that any insurance granted herein shall not cover where the assured or any carrier or other bailee has insurance which would attach, if this policy had not been issued."

(Standard Policy D.) "It is also understood and agreed, that in case of loss or damage under this policy, the as-[fol. 69] sured, in accepting payment therefor, thereby and by that act assigns and transfers to this Company all his or their right to claim for loss or damage, as against the carrier or other person or persons, to inure to their benefit, however, to the extent only of the amount of the loss or damage and attendant expenses of recovery paid or incurred by this Company; and any act of the Insured waiving or transferring, or tending to defeat or decrease any such claim against the carrier, or such other person or persons, whether before or after the insurance was made under this Policy, shall be a cancellation of the liability of this Company, for or on account of the risk for which loss is claimed."

(10) After notice of the collision on October 30, Louis Dreyfus & Company made a declaration to the Standard Marine Insurance Company, Ltd., under its policy, and furnished detailed statement on October 31, claiming as follows:

Highest Market Value on Oct. 27th $1.64¾ per bu. plus 5¢	$1.69¾
CIF Invoice value per bu.	1.38½
Increased value per bu.	$.31¼

10/26 Loaded at Ft. William	174,000 bus.
10/26 Loaded at Pt. Arthur	26,000 bus.
Total loaded	200,000 bus.

Lake Steamer Glenorchy sank on October 29th, being a total loss. 200,000 bus. at $.31¼ per bushel, $62,500.00.

(11) On November 3, 1924, Scottish Metropolitan Assurance Company paid Louis Dreyfus & Company the sum of $284,000, the amount due under its policy, the certificates of which had been endorsed in due course to Louis Dreyfus & Company.

(12) No certificate was issued by the Standard Marine Insurance Company covering this shipment; Louis Dreyfus & Company made claim against the Standard Marine Insurance Company for $62,500 as set out above, which said amount was in fact due by the Standard Marine Insurance Company, to the Louis Dreyfus & Company under said policy, and which was paid by Standard Marine Insurance Company, to Louis Dreyfus & Company on November 28, 1924.

[fol. 70] (13) The decree of the District Court in the limitation proceedings, in favor of Louis Dreyfus & Company is in the amount of $322,487.65 with interest at 5% per annum from October 29, 1924. This recovery awarded to Louis Dreyfus & Company is computed upon the actual value at port of loading on the total shipment of 208,392-40/60 bushels of wheat, which value was fixed by agreement at $1.54¾ per bu. The actual value at port of loading of the 200,000 bus. of wheat referred to above has been fixed in the final decree in the limitation proceedings, at $1.54¾ per bus. or at a total value of $309,500.

(1) The two insurances having been paid to Louis Dreyfus & Company to the amount of $346,500, were thus in excess of the $309,500 found due by the Court in the amount of $37,000. Also, the decree of the Court fixed the value of the cargo at $322,487.65, which is in excess of the value of the 200,000 bus. found by the decree at $1.54¾ per bu. to be worth $309,500.

The question presented is, "How shall the insurance fund awarded to Louis Dreyfus & Company be disposed of;

is the rule to be pro rata as claimed by the Standard Marine Insurance Company or is the Scottish Metropolitan Assurance Company so subrogated to the rights of Louis Dreyfus & Company that it is entitled to payment in full before any payment is made to the Standard Marine Insurance Company?"

CONCLUSIONS OF LAW

(1) That, where there are two marine insurers of a lost cargo, the marine insurance company which first pays its loss, by so paying its loss and taking an assignment of the claim of the insured against the other company, acquires no priority or advantage over the other insurance company which also pays to insurers under the terms of its policy and within the time fixed by its policy.

(2) That, where one marine insurance company insures a cargo of wheat of the value C.I.F. plus 3½¢ per bu. at the point of shipment, and another insures that part of the value of the market price per bu. at the point of delivery plus 5¢ per bu., which is above said C.I.F. price, and the cargo is lost, and on payment of said losses in full to the insured, the amount received by the cargo owner is in excess of what the court decrees is the value of the cargo in- [fol. 71] sured, then a rule of priority of subrogation in favor of the insurance company first paying does not apply and such excess of payment by the two insurance companies is to be returned to them pro rata.

(3) That, use of the words "to cover increased value of grain" shipped, in marine insurance policy, does not necessarily make such policy one of insurance on "profits" and, therefore, speculative.

(4) That, where two underwriters insured a cargo of wheat which was lost, the first underwriter by a valued policy "to cover 100% of the interest in that shipment of grain," and the other by an open policy "to cover increased value on grain owned by the assured or in which assured has an interest," and each underwriter paid its full loss to assured as the policy of each provided, which payments gave to the assured a sum greater than the value of the cargo as found by the Court, and the Court has also held

that assured should recover from the negligent ship owners the value of the cargo, the two underwriters are subrogated to the rights of assured against the ship owners.

(5) That, where the underwriter claiming on a valued policy based on a so-called "100% interest" in the cargo claims priority over the underwriter on an open policy, which is on "increased value" of the interest in cargo, the equitable rule to be followed since both are subrogated to the rights of the assured is that a priority shall not prevail and the two subrogated underwriters should share pro rata after payment of the expenses of litigation from the fund in the amount awarded the assured from the negligent ship owners; and that the assured may be made whole for his loss on the cargo, the order of disbursement of the fund should be: (1) expenses of litigation of cargo owner; (2) balance of fund to be paid pro rata to the two underwriters, since the assured has already been made whole by payment from the underwriters.

Memorandum

Briefs of able counsel indicate that they have industriously covered the field of marine insurance in search of authoritative precedents in the admiralty law of America and England, to find the equitable rule of disposition of the fund. All the authorities cited in the brief, and others, [fol. 72] have been examined by the Commissioner. The result of this search is that no precedent is found in any of the reported cases wherein facts have arisen such as this case presents. Analogous cases on marine insurance and subrogation and other cases have been found which are helpful. Starting then with the belief that the equitable disposition of this fund on the basis of the payment of each, would seem to be fair to each, and testing this by the analogies and precedents of the cases so far as applicable, this solution of the controversy is arrived at.

It was of a controversy between underwriters who had paid the losses, that Judge Hough had before him in Chemical Co. vs. Towing Co., 279 Fed. 684, pg. 686, when he said:

"The form has been dwelt upon as important for in substance this litigation is obviously a sort of case stated by two insurance companies, with a request that the courts

decide which of the two has succeeded in maneuvering the loss upon the other."

And Justice Holmes in Oelwerke vs. Erlanger, 248 U. S. 521, said that, "Neither side would be likely to inspire enthusiasm." In those cases, each court left the parties where it found them, but here the court must act, for the fund is in court for all practicable purposes, for division and disbursement.

At the outset, it is agreed by the parties that the fees and disbursements of Louis Dreyfus & Company should first be deducted from the fund of $309,500 to be paid by the ship owners found to be negligent. The division of the fund remaining after payment of expenses presents the other questions which are to be determined in this controversy.

The claim of the Standard Marine Insurance Company is that after deducting the Dreyfus expense of litigation from the item of $309,500, the sum remaining should be distributed pro rata between the underwriters, that is, the Standard Marine Insurance Company should receive 62,500/346,500 of $309,500 minus Dreyfus expense of litigation, and the balance, or 284,000/346,500 of $309,500, minus Dreyfus expense of litigation, should be paid to the Scottish Metropolitan Assurance Company.

The claim of the Scottish Metropolitan Assurance Company is that after deducting the Dreyfus expense of litigation from the $309,500, it should be paid $284,000 and [fol. 73] whatever balance remains should be paid to the Standard Marine Insurance Company.

The question briefly stated is as follows: Where a cargo of wheat has been lost, the value of which has been found by the Court to be $309,500 is insured by a "valued" policy for $284,000, the increased value on the same cargo of wheat is insured in an open policy for $62,500, and these sums totaling $346,500 are paid to the cargo owner who subsequently recovers $309,500, the actual value of the cargo of wheat as damages from the ship owners responsible for the loss, how are the insurers to be subrogated and to share in the recovery of the $309,500 to be paid by the negligent ship owners?

By the doctrine of subrogation, the underwriter succeeds to, takes or acquires the rights of the insured against the

insurer after the underwriter has paid the loss. As the Court said in St. Louis, etc. Railway vs. Commercial Ins., 139 U. S. at pg. 235:

"In fire insurance, as in marine insurance, the insurer, upon paying to the assured the amount of a loss of the property insured, is doubtless subrogated in a corresponding amount to the assured's right of action against any other person responsible for the loss. But the right of the insurer against such other person does not rest upon any relation of contract or of privity between them. It arises out of the nature of the contract of insurance as a contract of indemnity, and is derived from the assured alone, and can be enforced in his right only. * * * But in any form of remedy the insurer can take nothing by subrogation but the rights of the assured; and if the assured has no right of action, none passes to the insurer."

It is settled law that the underwriter can acquire from the insured no more than he had. It is also the rule and another way of saying the same thing that the insured or cargo owner in this instance, will not be permitted to benefit by reason of his insurance or as has been said in one of the English cases, he will not be permitted "to take with both hands."

Where there was a loss of a ship insured by a "valued" policy for $25,000 and which sum was paid to the owner who subsequently recovered $37,500, or actual value of the ship as damages, the insurer was held to be entitled to only such amount as had been paid out. In The "Livingstone," 130 Fed. 746, Judge Coxe of the Circuit Court of Appeals said, pg. 747:

[fol. 74] "Viewed as an original proposition, to be determined solely by the fundamental rules of equity, it would seem that but one answer is possible. How can the court make a more equitable disposition of the fund than by disbursing it so that the status quo before the collision is re-established? The insurer gets back the money he has paid under the policy, the owner gets back the value of his ship, both are made whole, and neither is permitted to profit at the expense of the other. Such a result would certainly seem equitable, but it must, of course, be sustained by authority. In our system of jurisprudence prin-

ciple is reached through precedent. The rights of the interveners rest either upon abandonment, bill of sale or subrogation, or all combined."

The Court follows this with a discussion of the facts in the Livingstone case, which, while concerned with the loss of a ship, furnishes authority for guidance in the case at bar, the subject matter of which is the ship's cargo. On the point as to whether the assured could profit by the insurance paid after a loss has occurred, this decision is authority for the doctrine that the assured can have no profit from his insurance by reason of the loss he has sustained. As the Court further said, pg. 749:

"Where the insurer has paid the entire amount of the loss he becomes subrogated, to the extent of his payment, to whatever interest the insured has in the property and to the latter's right to proceed against one who has negligently caused the loss.

"The doctrine of subrogation has its origin in equity, its purpose is indemnity and its object is attained when the insurer has been fully compensated. The doctrine cannot be invoked to consummate injustice; it does not permit one party to secure an unfair advantage over the other; it does not permit the insurer to speculate, or profit or drive an unconscionable bargain. When he is paid in full, equity requires the return of the balance to the insured in payment of his uncompensated loss."

Quoting with approval Memphis, etc., Railroad vs. Dow, 120 U. S. 287, Liverpool Steam Co. vs. Phoenix Ins. Co., 129 U. S. 397, and in conclusion the Court said:

[fol. 75] "We are fully convinced that equity and good conscience do not require the Court to go further and permit them (insurers) to realize an enormous profit from the transaction."

So in the case at bar, if Dreyfus and Company could not profit by their loss, neither should the Standard Marine Insurance Company or the Scottish Metropoljtan Assurance Company. The question then comes since the insurance companies are both subrogated to certain rights of Louis Dreyfus & Company by reason of their policies,

to what extent are each of the companies subrogated and what is the share of each in the fund which this Court will order to be paid by the negligent ship owner to the underwriters?

The rule has been established that where there is a loss of insured property and the underwriters on "increased value" have paid the loss, such underwriters will share pro rata with other underwriters in the fund recovered from the negligent ship owner. This was held in the case of Brown vs. Merchants Marine Ins. Co., 152 Fed. 411, which is the case that presents facts nearest to the situation as presented here. The facts were that the S. S. "City of Kingstone" was insured by various insurance companies under separate policies, the vessel valued in each at $75,000. Two other companies insured the owners of the ship in two policies aggregating $12,200 "on disbursements and/or increased value," insurance being against total loss and in addition a Central F. and M. Insurance Company insured the ship in the sum of $4,800 against total loss only, no valuation being inserted in that policy. The "City of Kingstone" was sunk in collision with the S. S. "Glenogle" and all underwriters on hull together with Central F. and M. Insurance Company paid total loss and at the request of these underwriters the owner of the "Kingstone" brought suit to recover damages from the owner of the "Glenogle." The Court on trial found both vessels at fault, the value of "Kingstone" at $140,000, and decreed division of damages; $67,472.96 was paid into the Court by the owners of the "Kingstone" and after payment of costs there was left in the registry of the Court $47,426.97. Then two underwriters on disbursements or increased value intervened, alleging that they had paid a total loss, and that they were entitled to share pro rata with all underwriters now found in Court, which claim the District Court sustained and made pro rata distribution to all the under[fol. 76] writers. On appeal, this decision was affirmed, the Court expressly holding that the insurers on increased value were entitled to share pro rata in the fund. At pg. 413, Judge Gilbert said:

"The assured in the policies issued by the appellees was in fact the owner of the property insured, and could undoubtedly have recovered on the policies. Such being the case, we are unable to discover any recognized principle of

law or equity on which it should be held that the appellees are not entitled to rank equally with the other underwriters in the distribution of the fund in court. No ground for discrimination against the appellees can be found in the fact that the policies which they issued covered 'disbursements.' The object of insurance on disbursements is to insure the shipowner the recovery of additional sums beyond the amount covered by his insurance on ship and freight, and it is made against total loss only. Arnould, Marine Ins. Sec. 247. The International Navigation Company vs. Atlantic Mutual Ins. Co., (D. C.) 100 Fed. 304, Judge Brown said that policies on disbursements are in very common use, and are 'designed to cover a variety of interests not covered by policies in the ordinary form, including moneys which have gone into the construction of the hull and equipment and sunk in depreciation. * * * "Disbursement" policies are often issued where the hull is fully covered by other policies.' And, since the appellees could, as we have seen, have been compelled to pay the loss under their policies, they are not, as suggested by the appellant, mere volunteers in paying the same and therefore to be denied the right of subrogation. Nor do we see that their delay in paying or their refusal to participate in the proceedings to recover damages from the owners of the Glenogle should be held to be ground for excluding them from participation in the fund: Subrogation results by operation of law from the mere act of the payment of the loss, and does not depend on the voluntary act of the assured. Phoenix Ins. Co. vs. Erie Transportation Co., 117 U. S. 312, 6 Sup. Ct. 750, 29 L. Ed. 873; St. Louis, etc. Railway vs. Commercial Ins. Co., 139 U. S. 223, 235, 11 Sup. Ct. 554, 35 L. Ed. 154. In the Livingstone, 130 Fed. 746, 65 C. C. A. 610, the amount in controversy was recovered by [fol. 77] the unaided effort of the owners, and against the active opposition of the intervening underwriters. It was held, notwithstanding this fact, that the interveners were entitled to subrogation. We find the general doctrine applicable to this case in Arnould, Marine Ins. Sec. 1215, where it is said:

'Upon abandonment each of the underwriters participates in the benefits of the transfer by sharing in the proceeds of the salvage according to the proportion which the

amount of his subscription bears to the whole value of the thing insured, and this without regard to the date of the different subscriptions, or the priority of the policies, if more than one.'

We find no error in the decree of the District Court. It is accordingly affirmed."

In Federal Insurance Co. et al. vs. Detroit Fire and Marine Insurance Co., 202 Federal 648, certiorari denied 229 U. S. 620, the Brown case was cited with approval by the Circuit Court of Appeals for the Sixth Circuit, which was a case where there were different classes of underwriters on hull, cargo and freight.

In Federal Insurance Company case the S. S. "Etruria" was in collision with S. S. "Amasa Stone" and upon suit, both vessels were held to blame and damages divided. There was a total loss of the "Etruria" and her cargo and she was insured by sixteen companies, holding risks in varying sums amounting to an agreed valuation, and the ship owner was paid such valuation by the insurers. The cargo and freight were separately insured and these losses paid. Eight of the insurers including the cargo and freight insurer requested and eight declined to request, the owner of the "Etruria" to bring suit which resulted in settling the question of liability. The District Court held that the non-requesting underwriters could not share pro rata, but this was reversed by the Circuit Court of Appeals holding that the execution of a subrogation receipt was not necessary in order to give the underwriters subrogated rights and Judge Warrington said, pg. 651:

"Most of the insurers obtained subrogation receipts from the owner upon paying their shares of its loss, some of which in terms provided for full subrogation and others 'to the extent only and as provided for' in the policies, although [fol. 78] the policies do not appear to have contained any provision for subrogation. However, we do not regard this as important, nor do counsel for either side because it is settled that such provisions are not necessary. The right of subrogation arises from the very nature of the contract of insurance as a contract of indemnity. Phoenix Insurance Co. v. Erie Transportation Co., 117 U. S. 312, 321; Liverpool Steam Co. v. Phœnix Ins. Co., 129 U. S. 462;

North England Ins. Assn. vs. Armstrong, L. R. 5 Q. B. 244; Comegys v. Vasse, 1 Peter 193, 212."

And again at pg. 652:

"Admittedly, the subrogation rights of all the insurers of the 'Etruria' were, when acquired, entitled to equal protection; but it is urged that the non-consenting insurers destroyed this equality by waiver."

The Court held that the refusal to request the bringing of the suit was not a waiver of the non-consenting underwriters' subrogated rights.

The Court said at pg. 654:

"The owner sought to recover and did recover (to the extent allowed) the proportionate shares alike of all the insurers. True, it did so in its name as owner, but at last in virtue of its Trusteeship respecting such shares."

At pg. 656, the Court said:

"It is settled in this court that so far as time is concerned, it is competent to intervene before final distribution of such a fund is made, for the purpose of presenting claims to an interest therein and for their establishment by decree. Mason v. Marine Insurance Co., 110 Fed. 452, 454; Continental Trust Company v. Toledo, St. L. & K. C. R. R. Co., 82 Fed. 642, 646; Central Trust Co. v. Richmond N. I. & B. R. Co., 105 Fed. 803, 808; See The Propeller Monticello v. Mollison, 17 Howard 152, 155; The Nonpareil, 149 Fed. 521, 525; but the priority given by the decree below to the expense of the libel litigation should be preserved as against appellants as well as appellees. Trustees v. Greenough, 105 U. S. 527; Central R. R. Co. v. Pettus, 113 U. S. 124, 126."

[fol. 79] The Court held in conclusion at page 657:

"That the claims of all the insurers of the hull, (of the 'Etruria') appellees and appellants alike, must be placed on an equality; and the claims for freight and crew will be placed on a parity with them."

Counsel for the Scottish Metropolitan urge that the terms of the insurance policies defeat the right of the Standard

Marine Insurance Company to be subrogated on an equality with the Scottish Metropolitan Assurance Company. The answer to this is that the right of subrogation is not founded on a contract between the insurer and the insured for the test is whether the insurer was obliged to pay and did pay a loss to the insured, and the amount of such payment. Such was the holding in The "Livingstone," 130 Fed. 746, where the S. S. "Grand Traverse" was sunk in Lake Erie in collision with the S. S. "Livingstone," and it was held that where the loss had been paid by the insurer and recovery was had by the insurer against the negligent vessel and there was an excess in the recovery over the amount of the insurance, the underwriters were not entitled to receive out of the money recovered, more than the underwriters had paid to the insured.

Coxe, Judge, in pointing out that policy valuation had no effect on the right of subrogation, said at pg. 749:

"Why the agreement of the parties upon a convenient basis of calculation should operate to change the principle upon which the insurer had, theretofore, been reimbursed, to the extent of his payment under the policy, it is not easy to understand."

And the Court cited with approval Memphis Railroad v. Dow, 120 U. S. 287, 301, as follows:

"The right of subrogation is not founded on contract. It is a creature of equity; is enforced solely for the purpose of accomplishing the ends of substantial justice; and is independent of any contractual relations between the parties."

From this case it appears that the Court holds that when it is considering subrogating rights of an underwriter who has paid a loss, the only material points are, how much has the underwriter paid and how much has the assured recovered against the wrong had with respect to the property which the underwriter insured? As Judge Warring-[fol. 80] ton said in the "Etruria" case supra, 202 Fed. 648, pg. 652:

"It is true, as claimed, that such right (the right of subrogation) is not founded on contract, but is a creature of equity (Memphis etc. R. R. v. Dow, 120 U. S. 301, 302,

7 Sup. Ct. 482, 30 L. Ed. 595); still it is none the less a right that is entitled to protection, and, as Justice Harlan said in that case, is enforced for the purpose of 'accomplishing the ends of substantial justice.'"

The English rule seems to be the same and it was so held in Thames & Mersey Marine Insurance Co. v. British & Chilean S. S. Co., 13 Asp. Mar. Cas. 221; (1916) 1 K. B. 30. There had been a total loss by a collision between the "Helvetia" and the "Empress of Britain" and both ships were held to blame. It was held that the underwriters were entitled to recover to the extent they had paid in respect to the subject matter they had insured, namely, the "Helvetia," in sums which defendant had received in respect of the loss of the same subject matter though that sum was based upon a larger sum than the insured subject matter.

This decision of the case in the Kings Bench Division appears in (1915) 2 K. B. 214, where Scrutton, Judge, said at pg. 221:

"I am, therefore, as a judge of first instance, bound by it (the decision in Armstrong's case, L. R. 5 Q. B. 244) and in my view it compels me to hold that the underwriters here are entitled to recover to the extent to which they have paid in respect of the subject matter insured any sum which the ship owners have received as a right in respect of the loss of the same subject matter, though that sum is based on a larger value than the insured value."

The controversy concerned what was actually insured by the policy of each company. The Standard Marine Insurance Company policy is to Louis Dreyfus & Company "upon all kinds of lawful goods, wares, merchandise and products, laden on board the good vessel or vessels * * * lost * * * at and from port to ports * * *" and the rider clause (Standard Policy (A) above) provides to cover "increased value on grain owned by the assured or in which the assured may have an interest, such increased value for the purpose of this insurance to be arrived at * * * etc."

[fol. 81] The policy of the Scottish Metropolitan Assurance Company provides that on account of whom it may concern, the assured, in this instance the shipper, do make insurance as per the form attached to the policy, which

is (Scottish Policy A) "to cover 100% interest in all shipments of grain and/or flax seed and/or cereals and/or maize, from owner, or in which they may have an insurable interest * * *."

From both policies it thus appears that res, or subject matter insured, is a cargo of grain, 200,000 bu. of wheat. While the Scottish Metropolitan Assurance Company policy is a "valued" policy, from the policy and the certificates of insurance issued on October 26, 1924, it appears the cargo insured consisted of 200,000 bu., the price of which per bu. per Exhibits A and B at the point of shipment was $1.38½ C. I. F., yet it was insured in this "valued" policy at $1.42 per bu., so that the loss on 200,000 bu. was $284,000.

The res, or subject matter insured, by the Standard Marine Insurance Company policy by its terms was upon "lawful goods, wares, merchandise and products laden on board the good vessel" and the rider was attached to the policy which contained the words "to cover 'increased value' on grain." This language would seem to indicate that the thing insured by the Standard Marine Insurance Company was also a cargo of grain.

The Scottish Metropolitan claims that the res insured by the Standard was profits and bases such claim on the fact that of the use of the words "increased value" in the Standard policy, while its policy is for "100% interest in all shipments of grain," and that its policy is a "valued" policy while the policy of the Standard Marine Insurance Company is an "open" or "unvalued" policy.

In considering the res, or subject matter, covered by each policy, the insurance effected on each separate bushel of wheat is important.

The Scottish Metropolitan policy is on 200,000 bu. of wheat at $1.42 per bu. As shown in Exhibits A and B, the C. I. F. price of this wheat was $1.38½ and the insurance was effected at $1.42.

The Standard policy covers the "increased value" on the same wheat for that rate which the market price in Montreal is above the C. I. P. price plus 5¢ per bu. The Montreal price was fixed by the claim filed by Louis Dreyfus & Company and allowed by the Standard at $1.64¾ per bu., which plus the 5¢ per bu., makes up the $1.69¾ per bu., [fol. 82] making a difference of 31¼¢ per bu., which was

the basis of payment made by the Standard Company policy, and so paid.

The price of $1.54¾ per bu. was fixed by the former Court order as the value of the wheat when lost so that the difference between $1.54¾ and $1.69¾ per bu. or 15¢ per bu., is $30,000; also, it should be remembered that the Scottish Metropolitan insured above the C. I. F. price, the difference between $1.38½ and $1.42 or 3½¢ per bu., which on 200,000 bu. is $7,000. It thus appears that that part of the price of each bushel of wheat between $1.38½ and $1.42 was insured by both companies and payment to Louis Dreyfus & Company, the cargo owner, was made by both companies without protest. The $30,000 above and the $7,000 together make up the $37,000, which sum is the amount paid by the underwriters in excess of the value of the wheat as allowed by the Court's former decree.

From the decision in the Livingstone case supra, it would appear that Louis Dreyfus & Company would not be entitled to hold any part of this $37,000 excess of payment over actual insured value as against the claims of the underwriters. Insurance companies being subrogated to the rights of Louis Dreyfus & Company, neither can thereby acquire any greater right than Louis Dreyfus & Company had.

Claim is made that there is no double insurance since the companies insured different risks. Double insurance is defined in 38 Corpus Juris 1159 under Marine Insurance as:

"Double insurance is where insured procures two or more insurances upon the same interest, on the same property and for the same risk."

The Scottish Metropolitan Assurance Company insured at $1.42 per bu. which was 3½¢ above C. I. F. at port of shipment on October 27, and paid on basis of $1.42; yet the Court found that the value of the wheat was $1.54¾ at port of shipment on October 27, so that the language "100% interest" in the cargo, as used in Scottish Metropolitan Assurance Company policy must mean 100% interest in subject matter as distinguished from 100% interest in value as such. The actual facts as to varying values show it could not refer to 100% value; and, of course, since it was a valued policy, parties themselves fixed the values,

but this fact should not deter one in arriving at the meaning of the language used.

[fol. 83] The Scottish Metropolitan Assurance Company claims that since the Standard Marine Insurance Company policy covers "increased value" that policy is one "on profits" while its policy is on value; and that thus different subject matters were insured and consequently there can be no double insurance or contribution between the underwriters.

In considering the res, or subject matter, of the Standard Marine Insurance Company policy of which the language is "to cover increased value on grain," it appears that this "increased value" by the agreed facts, is that range in price from $1.38½ per bu. to $1.69¾ per bu., or 31¼¢. Analyzing this difference in price, the Standard Marine Insurance Company covers $1.38½ C. I. F. at point of shipment to $1.42 or 3½¢ which was also covered by the policy of the Scottish Metropolitan Assurance Company. From $1.42 to $1.54¾ value at point of shipment as fixed by the decree or 12¾¢, is covered only by the Standard Marine Insurance Company; from the difference in price at point of shipment on date of loss, $1.54¾, to difference at point of destination $1.64¾ or 10¢ per bu. was also covered only by the Standard Marine Insurance Company. The Standard Marine Insurance Company policy also covers an additional 5¢ which made up the balance of the valuation and the limit of its coverage. Thus, of the 31¼ covered by the Standard Marine Insurance Company policy by the admitted fact, 26¼¢ of the price per bu. paid by the Standard Marine Insurance Company was on actual value above the C. I. F. price.

The Standard Marine Insurance Company urges that the use of the words "increased value" in clause three of the policy necessary to properly describe the amount of the coverage which the shipper had under its C. I. F. contract, and that the insurance provided in clause three of its policy was not "profits" insurance. Insurance on profits although perfectly legal, is a speculative insurance and it cannot be said that there was anything speculative about the insurance provided in clause three of the Standard Marine Insurance Company policy. The amount of the insurance provided by that clause was based on real value, the different provisions in clauses four and three of the Stand-

ard Marine Insurance Company policy do not change the kind of insurance, they merely provide for a different amount of the same kind of insurance.

[fol. 84] It is further urged that the Standard Marine Insurance Company policy is a speculative one. From the analysis above, it will be seen that such can only result if it were to be held that the 5¢ provision made the Standard Marine Insurance Company policy speculative; and that because of that 5¢ the whole policy should be called a speculative policy; but this should not result since the 5¢ is less than 3% of the price quotation. Again, if it were to be held that the Standard Marine Insurance Company policy is speculative, what is to be said of the Scottish Metropolitan Assurance Company rate, which provided an additional 3½¢ above the C. I. F. price? That policy would also be speculative and one on profits with the result that the two policies, being of the same kind, the underwriters should prorate in the distribution of the fund.

Canada Sugar Refining Co. vs. Ins. Co. of North America, 175 U. S. 609, presents a case of insurance on "profits." The language being "$15,000 on profits on cargo of sugar against total loss only, valued at sum insured," properly held that where there had been a total loss of cargo, with the total loss of profits with separate insurance on cargo and on profits as such, the assured may in case of total loss of cargo abandon the cargo to the underwriters on cargo and collect in full from the underwriters on profits. The case held that where there is insurance on profits in case of loss the assured does not need to know that there would have been any profits if the goods had arrived at destination, citing Patapsco Ins. Co. vs. Coulter, 3 Peters 222; or in other words, insurance on profits while perfectly legal insurance is speculative. In the present case the insurance on increased value issued by the Standard Marine Insurance Company was on actual excess and proved value of 26¼¢ per bu. over the amount of the C. I. F. price and the additional constant of 5¢ over the market value should not change this insurance on actual and proved value of the cargo of grain to speculative insurance on profits.

Insurance on profits seems to be a very different thing from the insurance on cargo where the amount of the latter insurance is necessarily described as insurance on increased

value. Insurance on profits is well known and is held to be speculative insurance.

The Patapsco Insurance Co. vs. Coulter, 3 Peters 222;

[fol. 85] Canada Sugar Refining Co. vs. Insurance Co. of North America (1900) 175 U. S. 609;

O'Brien vs. North River Ins. Co. (1914 C. C. A. 4C) 212 Fed. 102;

Mumford vs. Hallett, 1 Johns. (N. Y.) 439.

Counsel for Scottish Metropolitan finally urge that the warranty against insurance which appears in the Standard Marine Insurance Company policy (Standard Policy C, above) supports their claim that the Standard Marine Insurance Company expressly agreed that it did not insure in respect of the grain. By that provision the Standard Marine Insurance Company warranted that any insurance granted in its policy should not cover where the Louis Dreyfus & Company or any carrier or bailee had insurance which would attach to this grain if the policy to Louis Dreyfus & Company had not been issued. This is a matter of contract between Louis Dreyfus & Company and the Standard Marine Insurance Company; the Standard Marine Insurance Company paid the full amount of the claim made by Louis Dreyfus & Company to Louis Dreyfus & Company and how can the fact of such a provision in its policy have any bearing on the claims of the Scottish Metropolitan Assurance Company? This was a matter of contract between Louis Dreyfus & Company and the Standard Marine Insurance Company and apparently the Standard Marine Insurance Company has waived its rights by making payment to Louis Dreyfus & Company. We fail to see how the existence of this clause in the Standard Marine Insurance Company policy can have any effect on the Standard Marine Insurance Company's right to subrogation against that part of the fund to be paid by the ship owners to Louis Dreyfus & Company.

Your Commissioner, therefore, reports that the petitioners, the Standard Marine Insurance Company and the Scottish Metropolitan Assurance Company, be decreed to share pro rata in the fund awarded to Louis Dreyfus & Company after payment from the fund of the expenses of litigation of said Louis Dreyfus & Company.

By stipulation, the parties hereto have agreed that fees and disbursements in amounts agreed to shall be first paid from the fund, and that either party may have ten (10) days in which to file exceptions to the Commissioner's report.

[fol. 86] Herewith are returned the following papers which have been filed in the cause:

(1) Order of reference to Wm. B. Woods as Special Commissioner.

(2) Petition of Standard Marine Insurance Company, Ltd.

(3) Amended petition of Standard Marine Insurance Co., Ltd.

(4) Petition of Scottish Metropolitan Assurance Co., Ltd.

(5) Answer of Scottish Metropolitan Assurance Co., Ltd.

(6) Answer of Standard Marine Insurance Co., Ltd.

(7) Agreed Statement of Facts.

(8) Exhibits.

(9) Brief on behalf of Standard Marine Insurance Co., Ltd.

(10) Brief on behalf of Scottish Metropolitan Assurance Co., Ltd.

(11) Reply brief on behalf of Standard Marine Insurance Co., Ltd.

(12) Reply brief on behalf of Scottish Metropolitan Assurance Co., Ltd.

(13) Letter including memorandum of Duncan and Mount, counsel for Standard Marine Insurance Co., Ltd.

(14) Letter including memorandum of Bigham, Englar and Jones, counsel for Scottish Metropolitan Assurance Co., Ltd.

Respectfully submitted.

Wm. B. Woods, Special Commissioner.

January 14, 1928.

[fol. 87] IN UNITED STATES DISTRICT COURT

EXCEPTIONS OF SCOTTISH METROPOLITAN ASSURANCE CO., LTD., TO REPORT OF SPECIAL COMMISSIONER, WILLIAM B. WOODS—Filed Jan. 23, 1928

The exceptions of Scottish Metropolitan Assurance Company, Ltd. to the report filed on January 14, 1928, by Special Commissioner William B. Woods, appointed on April 20, 1927, respectfully alleges and shows as follows:

1. In that as the parties stipulated all the facts of the case the Commissioner erred in returning any findings of fact.

2. In that the Commissioner found as a conclusion of law that by the taking of an assignment of a claim from an insured by an insurance company, such insurance company acquired no priority or advantage over another insurance company which also paid a loss to the insured under the terms of its policy.

3. In that the Commissioner found as a conclusion of law that where one marine insurance company insures a cargo of wheat of the value C. I. F. plus 3½¢ per bu. at the point of shipment, and another insures that part of the value of the market price per bu. at the point of delivery plus 5¢ per bu., which is above said C. I. F. price, and the cargo is lost, and on payment of said losses in full to the insured, the amount received by the cargo owner is in excess of what the court decrees is the value of the cargo insured, then a rule of priority of subrogation in favor of the insurance company first paying does not apply, and such excess of payments by the two insurance companies is to be returned to them pro rata.

4. In that the Commissioner found as a conclusion of law that use of the words "to cover increased value of grain" shipped, in marine insurance policy, does not necessarily make such policy one of insurance on "profits" and, therefore, speculative.

5. In that the Commissioner found as a conclusion of law that where two underwriters insured a cargo of wheat which was lost, the first underwriter by a valued policy "to cover 100% of the interest in that shipment of grain," and

the other by an open policy "to cover increased value on grain owned by the assured or in which assured has an interest," and each underwriter paid its full loss to assured [fol. 88] as the policy of each provided, which payments gave to the assured a sum greater than the value of the cargo as found by the Court, and the Court has also held that assured should recover from the negligent ship owners the value of the cargo, the two underwriters are subrogated to the rights of assured against the ship owners.

6. In that the Commissioner found as a conclusion of law that where the underwriter claiming on a valued policy based on a so-called "100% interest" in the cargo claims priority over the underwriter on an open policy, which is on "increased value" of the interest in cargo, the equitable rule to be followed since both are subrogated to the rights of the assured is that a priority shall not prevail and the two subrogated underwriters should share pro rata after payment of the expenses of litigation from the fund in the amount awarded the assured from the negligent ship owners; and that the assured may be made whole for his loss on the cargo, the order of disbursement of the fund should be: (1) expenses of litigation of cargo owner; (2) balance of fund to be paid pro rata to the two underwriters, since the assured has already been made whole by payment from the underwriters.

7. In that the Commissioner failed to find that the right to subrogation arises out of the contract of insurance and is limited to the interest insured.

8. In that the Commissioner failed to find that there can be subrogation only in respect of the interest insured.

9. In that the Commissioner failed to find that when the fund recovered by an insured is insufficient to repay two underwriters solely because one of the underwriters has insured the interest described as increased value at a sum in excess of its actual value, such underwriter should not be permitted to deprive the other of a full recovery.

10. In that the Commissioner failed to find that a recovery by an insured is for the benefit of underwriters in respect of the interests insured by each and when the interest insured by one underwriter is in respect of grain and the [fol. 89] interest by the other is in respect of "increased

value," the right to subrogation is limited to the interests thus described.

Dated, January 23rd, 1928.

Day & Day and Bigham, Englar & Jones, Proctors for Exceptor Scottish Metropolitan Assurance Company, Ltd.

IN UNITED STATES DISTRICT COURT

OPINION SUSTAINING EXCEPTIONS TO REPORT OF SPECIAL COMMISSION.—Filed July 18, 1928

JONES, J.:

This matter is before the Court on exceptions to the report of the Special Commissioner, to whom had been referred for findings of fact and conclusions of law the issues raised between the Scottish Metropolitan Assurance Company, Ltd. and the Standard Marine Insurance Company, Ltd., concerning the distribution of money paid by the underwriters for the loss of a cargo of wheat. The Commissioner found and concluded upon full hearing that the companies should be decreed to share pro rata in the fund awarded to the owner of the cargo after the payment of expenses of litigation incurred by the owner.

The facts were stipulated by the parties and are set forth fully in the report of the Commissioner. The Scottish Company issued its policy on the cargo of wheat for the full value of the wheat at an agreed full valuation of $284,000.00. The Standard Company later issued an open policy on the same cargo to cover increased value on the grain [fol. 90] and indemnifying against loss on the basis of the difference between invoice value and the highest market value, plus five cents, between the day of sailing at the point of shipment and the day of final delivery at destination. The cargo was lost in collision and both companies paid the full amounts provided by the policies. In the limitation of liability proceedings which followed, the value of the cargo was fixed at a total value of $309,500.00. The Scottish Company paid to the owner of the cargo $284,000.00; the Standard Company, $62,500.00.

The distribution of the fund found by decree of court is the question for decision. The Standard Company contends that the fund should be distributed pro rata between the underwriters; the Scottish Company asserts that it should be entitled to reimbursement in full in preference to any payment to the Standard Company.

Since the fund in dispute arises out of a liability fixed by decree of court based upon value of the cargo at the time and place of shipment, the question of subrogation seems to be important.

It will not be possible to review the findings of the Commissioner at this time, nor to set down fully the considerations upon which a conclusion has been reached.

Upon consideration of the questions presented, I am constrained to take an opposite view from that reported by the Commissioner. The insurer is in equity subrogated to such rights only as the assured had. If the owner of the wheat is limited in his right to recover against the offending ship for loss based upon value at the time and place of shipment, it seems clear that subrogation can extend only to such limit or value. Since the owner of the cargo could not recover against the Miller for increased value based upon a market price at the point of delivery, no such right could pass to or be enforced by the Standard Company. Subrogation does not arise out of the contractual liability of the insurer to pay a specified sum upon loss, but depends upon the right of the loser of the cargo to collect from the wrongdoer. The increased value of the wheat was not a loss which the Miller was required to pay. Subrogation extends only to that which the assured can recover. Despite the language of the Standard policy, it was not in fact or law insurance upon the cargo but upon [fol. 91] the price at the point of delivery, for the loss of which there was no recovery by the owner of the cargo against the offending ship and, therefore, no subrogation.

The indemnity provided by the Standard policy did not cover the character of loss for which recovery could be had by the owner against the Miller, and, therefore, the Standard Company is not entitled to prorate with the Scottish Company in the distribution of a fund representing actual value at the time and place of shipping. I think

the Scottish Company entitled to full payment from the fund.

The exceptions to the Commissioner's report will be sustained, and the Standard Company may have exceptions to the ruling here made.

Paul Jones, United States District Judge.

July 18th, 1928.

In United States District Court

Order Sustaining Exceptions to Report of Special Master.—July 18, 1928

This day this cause came on to be heard on the exceptions to the report of the Special Commissioner and was submitted to the Court; on consideration thereof the Court sustained said exceptions, to which ruling of the Court, Standard Marine Insurance Company, Ltd. by its proctors, excepts.

[fol. 92] In United States District Court

Final Decree; Exceptions to Commissioner's Report Sustained; Distribution and Payment of Collision-Recovery Fund Directed to Be Made to Designated Cargo Underwriters.—Sept. 26, 1928, by Paul Jones, Judge

A final decree having been entered herein awarding to the claimants Louis Louis-Dreyfus and Charles Louis-Dreyfus, copartners, trading under the firm name and style of Louis-Dreyfus & Company, owners of a cargo of 208,392.40/60 bushels of wheat on the steamship "Glenorchy," the sum of $322,487.65 with interest thereon at the rate of five per cent (5%) per annum from October 29, 1924, until paid as the value of the said cargo at the port of shipment without including any element of increase in value of the cargo which might have resulted if the vessel had reached destination;

And it appearing that the parties have agreed that the Scottish Metropolitan Assurance Company, Limited, is

entitled to receive the entire sum recovered in respect of 8,392-40/60 bushels of wheat which has been computed and agreed to be the sum of $12,987.65;

And the Standard Marine Insurance Company, having filed a petition herein for distribution to it of a sum in excess of $56,000 of the remainder of said fund, on the ground that it insured and paid said sum to Louis-Dreyfus & Company under an open policy relating to 200,000 bushels of the cargo covering increased value and indemnifying against loss on the basis of the difference between invoice price and the highest market value, plus five cents, between the day of sailing at the port of shipment and the day of final delivery at destination;

And the Scottish Metropolitan Assurance Company, Limited, having filed herein a petition for distribution to it of $284,000 with interest from the 29th day of October, 1924, out of said fund, on the ground that it insured and paid said sum to Louis-Dreyfus & Company under an ordinary cargo policy on the said 200,000 bushels of the cargo, as the full value of the wheat at the time of shipment at an agreed full valuation of $284,000.00;

And the Court having referred the issues on said petitions to William B. Woods, Esquire, as Commissioner, for report;

And the parties having filed with said Commissioner an agreed statement of all the facts;

[fol. 93] And the said Commissioner, after hearing argument of counsel, having filed herein his report recommending that the Standard Marine Insurance Company and the Scottish Metropolitan Assurance Company, Limited, be decreed to share pro rata in $309,500 representing the value of 200,000 bushels, which is the remainder of said fund after deducting the sum of $12,987.65 as aforesaid.

And the Scottish Metropolitan Assurance Company, Limited, having filed exceptions to the report of said Commissioner and said exceptions having duly come on for hearing and having been submitted by counsel for both parties on briefs filed with the court, and due consideration and deliberation having been had, and the court having filed herein its opinion that the exceptions to said Commissioner's report should be sustained; that the Scottish Metropolitan Assurance Company, Limited, recover

in full and not on a pro rata basis from said fund the sum of $284,000, with interest at five per cent (5%) per annum from the 29th day of October, 1924, and costs, being the sum insured by it, without deduction; and that the Standard Marine Insurance Company, Ltd., recover only from the remainder left of said fund after the petition and claim of the Scottish Metropolitan Assurance Company, Limited, have been satisfied and paid in full; and good cause appearing therefor.

It is hereby ordered that there be first paid from said fund to the Scottish Metropolitan Assurance Company, Limited, the said sum of $12,987.65 with interest at the rate of five per cent (5%) per annum from October 29, 1924, to April 29, 1928, amounting to $2,272.84, a total of $15,260.49; and

It is hereby further ordered that the said exceptions to the Commissioner's report be and the same hereby are sustained, with costs in the sum of $—; and

It is hereby further ordered that the said petition of the Scottish Metropolitan Assurance Company, Limited, be granted, and that there be immediately paid from the Registry of this court and/or by the owners and stipulators for value of the steamship "Leonard B. Miller" to the Scottish Metropolitan Assurance Company, Limited, the sum of $284,000 with interest thereon at the rate of five per cent (5%) per annum from October 29, 1924, to April [fol. 94] 29, 1928, amounting to $49,700.00, and with interest at said rate on $50,969.11 of said sum from April 29th, 1928, to August 18, 1928, the date of entry of this decree, amounting to $778.82; and with costs in the sum of $16.50 a total, including the $15,260.49 above named of $349,739.31, with interest thereon at the rate of five per cent (5%) per annum from the date hereof until paid, and that the said sums be paid to the proctors of record for said Scottish Metropolitan Assurance Company, Limited, in this case, and their receipt accepted for the same as final; and

It is further ordered that the Commissioner be paid from said fund of $322,487.65, his costs in the sum of $1,245.00; and

It is further ordered that the petition of the Standard Marine Insurance Company, Ltd., be denied with costs,

provided, however, that there be paid to the proctors for the Standard Marine Insurance Company, Ltd., the remainder of said fund (their receipt being accepted for the same as final); and

It is further ordered that the sum of $620, the said portion of the expenses payable by the Standard Marine Insurance Co., Ltd., be paid from said fund to the proctors for the Scottish Metropolitan Assurance Company, Limited; and

It is further ordered that by payment of the sums aforesaid this decree shall stand satisfied.

IN UNITED STATES DISTRICT COURT

PETITION FOR APPEAL.—Filed Dec. 1, 1928

To the Honorable Paul Jones, District Judge:

The intervening petitioner, Standard Marine Insurance Company, Ltd., conceiving itself aggrieved by the final decree entered in this cause on the 26th day of September, 1928, whereby the Court among other things, adjudged and [fol. 95] decreed that the above named intervening petitioner, Standard Marine Insurance Company, Ltd., was not entitled to share pro rata with the Scottish Metropolitan Assurance Company, Ltd., in the fund of $309,500.00, with interest thereon at the rate of five (5) per cent per annum from October 29, 1924, and that the Scottish Metropolitan Assurance Company, Ltd., should have and receive out of the said fund of $309,500.00 with interest, which fund represented the recovery awarded to Dreyfus & Company as owner of 200,000 bushels of wheat on the S/S. "Glenorchy" which was insured by both the Standard Marine Insurance Company, Ltd., and the Scottish Metropolitan Assurance Company, Ltd., full reimbursement in the sum of $284,000.00 with interest thereon at the rate of five (5) per cent per annum from October 29, 1924, and that the Standard Marine Insurance Company, Ltd., was only entitled to receive the balance of such fund after such payment in full to the Scottish Metropolitan Assurance Company, Ltd., and which also ordered that the Commis-

sioner's costs of $1245 be paid out of the fund representing cargo's recovery, now comes by its counsel and petitions this Court for an order allowing said Standard Marine Insurance Company, Ltd., to prosecute an appeal from said decree as above set forth to the United States Circuit Court of Appeals for the Sixth Circuit, sitting at Cincinnati, Ohio, under and according to the laws of Congress and the statutes of the United States in such cases made and provided; and that a transcript of the record containing the testimony, exhibits, stipulations and all proceedings herein duly authenticated shall be prepared under the supervision of the Clerk and be forthwith transmitted to said the United States Court of Appeals.

Respectfully submitted.

Duncan & Mount, James M. McSweeney, Proctors for Standard Marine Insurance Company, Ltd.

[fol. 96] IN UNITED STATES DISTRICT COURT

ASSIGNMENTS OF ERROR—Filed Dec. 1, 1928

The Standard Marine Insurance Company, Ltd., intervening petitioner herein, hereby assigns errors in the finding, decision and final decree of the United States District Court for the Northern District of Ohio, Eastern Division, made and entered herein on or about September 26, 1928, as follows:

First. In that the Court sustained the exceptions of Scottish Metropolitan Assurance Co. Ltd. to the report of the Special Commisioner filed herein on the 14th day of January, 1928.

Second. In that the Court failed to confirm the report of the Special Commissioner filed herein on the 14th day of January, 1928.

Third. In that the Court held that the Standard Marine Insurance Company, Ltd. was not entitled to share pro rata with the Scottish Metropolitan Assurance Co. Ltd. in the fund of $309,500., with interest thereon at the rate of five percent (5%) per annum from October 29, 1924, which

fund was the amount of the recovery awarded to Dreyfus & Company, as owner of 200,000 bushels of wheat on the S/S Glenorchy sunk in collision with the S/S Leonard B. Miller, which wheat was insured by both the Standard Marine Insurance Company, Ltd. and the Scottish Metropolitan Assurance Co. Ltd.

Fourth. In that the Court held that the Scottish Metropolitan Insurance Co., Ltd.'s policy on the said wheat was for the full value thereof.

Fifth. In that the Court held that:

"Despite the language of the Standard policy, it was not in fact or law insurance upon the cargo but upon the price at the point of delivery, for the loss of which there was no recovery by the owner of the cargo against the offending ship and, therefore, no subrogation."

Sixth. In that the Court held that the Scottish Metropolitan Assurance Co. Ltd., was entitled to full reimbursement of $284,000. with interest thereon at the rate of five percent (5%) per annum from October 29, 1924, from the fund representing cargo's recovery, and that the Standard Marine Insurance Company, Ltd. was only entitled to receive the balance of such fund after such payment in full [fols. 97 & 98] of $28,000. with interest to Scottish Metropolitan Assurance Co., Ltd.

Seventh. In that the Court ordered that the commissioner's costs of $1245.00 be paid out of the fund representing cargo's recovery.

Dated New York, November 27, 1928.

Duncan & Mount and James M. McSweeney, Proctors for Standard Marine Insurance Company, Ltd.

IN UNITED STATES DISTRICT COURT

ORDER ALLOWING APPEAL AND FIXING BOND.—December 1, 1928

On petition of Messrs Duncan & Mount and James M. McSweeney, counsel for Standard Marine Insurance Co.,

Ltd., intervening petitioner herein, it is ordered that an appeal to the United States Circuit Court of Appeals for the Sixth Circuit from the decree heretofore filed and entered in this cause on the 26th day of September, 1928, be and the same is hereby allowed, and that a certified transcript of the record in accordance with the rules of the Courts of the United States be transmitted to said United States Circuit Court of Appeals.

It is further ordered that the bond on appeal be fixed in the sum of Two Hundred Fifty Dollars.

Bond on appeal for $250.00, approved and filed December 8, 1928, omitted in printing.

[fols. 99 & 100] Citation, in usual form, showing service on Day & Day and Bigham, Englar & Jones, omitted in printing.

[fol. 101] In United States District Court

Stipulation re Certification of Record—Filed Dec. 7, 1928

In accordance with Section 7 of Rule 44 of the general rules of this Court, it is hereby agreed that the record as presented to the Clerk by the printer, may be certified by the Clerk as required by law and the rules of the Appellate Court, as a true, full and complete copy of the original pleadings, papers and orders used on the trial of this cause, as set forth in the precipe for transcript, without further comparison by the clerk.

Duncan & Mount and James M. McSweeney, Proctors for Standard Marine Insurance Company, Ltd. Bigham, Englar & Jones, Day & Day, Attorneys for Scottish Metropolitan Assurance Company, Ltd.

IN UNITED STATES DISTRICT COURT

STIPULATION AS TO THE TRANSCRIPT OF RECORD—Filed Dec. 7, 1928

It is hereby stipulated and agreed that the foregoing is a true transcript of so much of the record of the said District Court in the above entitled matter as is pertinent to the appeal herein.

Dated Dec. 5, 1928.

Duncan & Mount and James M. McSweeney, Proctors for Standard Marine Insurance Company, Ltd. Bigham, Englar & Jones, Day & Day, Proctors for Scottish Metropolitan Assurance Company, Ltd.

[fol. 102] IN UNITED STATES DISTRICT COURT

PRÆCIPE FOR TRANSCRIPT—Filed Dec. 7, 1928

To the Clerk:

Please prepare transcript of record for the Circuit Court of Appeals in the above entitled cause, and include therein the following papers and orders:

1. Petition of Columbia Steamship Company for Limitation of Liability as owner of the Steamer Leonard B. Miller.

2. Opinion of Judge Jones on the merits in the limitation proceedings.

3. Stipulation covering damages.

3a. Order allowing filing of affidavit of James T. Irving.

4. Original affidavit of James T. Irving covering prices of wheat in store at Fort William or Port Arthur.

5. Final decree on the merits in limitation proceedings.

6. Amended petition of intervention of Standard Marine Insurance Company, Ltd., April 23, 1927.

7. Answer of Scottish Metropolitan Assurance Company, Ltd., to said amended petition.

8. Petition for intervention of Scottish Metropolitan Assurance Company, Ltd.

9. Answer of Standard Marine Insurance Company, Ltd., to said petition.

10. Order of April 20, 1927, referring case to William B. Woods, Special Commissioner.

11. Agreed statement of facts together with Exhibits A to G inclusive.

12. Report of William B. Woods, filed January 14, 1928.

13. Exceptions of Scottish Metropolitan Assurance Co., Ltd., to said report.

14. Opinion of Judge Jones, dated July 18, 1928, sustaining exceptions to said report.

15. Formal rule of court sustaining said exceptions.

[fols. 103 & 104] 16. Final decree sustaining exceptions and directing distribution of fund.

17. Petition of Standard Marine Insurance Co., Ltd., for Appeal.

18. Assignments of error.

19. Order allowing appeal of Standard Marine Insurance Company, Ltd.

20. Bond for costs on appeal.

21. Citation on appeal.

22. Stipulation under Section 7 of Rule 44 as to the record.

23. Stipulation as to the transcript of the record.

24. Clerk's Certificate.

25. Order extending time for filing transcript of record.

26. Præcipe for transcript of record.

And deliver all papers to The Gates Legal Publishing Company for printing.

Duncan & Mount and James M. McSweeney, Proctors for Standard Marine Insurance Company, Ltd.

IN UNITED STATES DISTRICT COURT

ORDER EXTENDING TIME FOR FILING TRANSCRIPT OF RECORD—January 3, 1928

On application made and for good cause shown, it is ordered that the time for filing the transcript of record in the United States Circuit Court of Appeals be extended to February 6th, 1929.

[fols. 105 & 106] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 107] Appearance of counsel omitted in printing.

Minute entry of argument and submission January 9, 1930, omitted in printing.

IN UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT

JUDGMENT—Filed April 7, 1930

Appeal from the District Court of the United States for the Northern District of Ohio.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Ohio, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be and the same is hereby affirmed with costs.

[fol. 108] IN UNITED STATES CIRCUIT COURT OF APPEALS

OPINION—Filed April 7, 1930

Before Denison and Hickenlooper, Circuit Judges, and Tuttle, District Judge

TUTTLE, District Judge:

This admiralty proceeding involves the rights of two marine insurers, appellant and appellee here, to share, by

subrogation to the rights of the insured, in a certain fund recovered by the insured as damages for a part of a loss covered by insurance paid to the insured by said insurers.

Before any of the insurance in question had been effected the insured had purchased two hundred thousand bushels of wheat, for future delivery at Montreal, Canada, at a C. I. F. invoice of $1.38½ per bushel. This wheat was insured by the seller for the benefit of the purchaser as the insured, with the appellee insurer, at an agreed valuation of $1.42 per bushel. The policy included the following provision: "In case of any insurance upon the said goods subsequent in date to this Policy, the said Assurers shall nevertheless be answerable for the full extent of the sum by them insured, without right to claim contribution from such subsequent insurers, and shall accordingly be entitled to retain the premium by them received, in the same manner as if no such subsequent insurance had been made."

Thereafter, the insured obtained from the appellant insurer additional insurance upon this wheat on the following basis, and to the following extent, as provided in the policy of said insurer: "To cover 'Increased Value' on grain owned by the Assured or in which the Assured may have an interest, such 'Increased Value' for the purposes of this insurance, to be arrived at by taking the difference between the C. I. F. invoice cost and the highest market value per bushel, plus 5¢ (Five cents), as set out in the 'New York Journal of Commerce' between the day of sailing of the vessel at point of shipment, and the day of the final delivery of the complete cargo at destination as named in the Certificate, both days inclusive; and in the event of casualty, to be valued at the difference between the C. I. F. [fol. 109] invoice cost and the highest market value per bushel, plus 5¢ (Five cents) as set out in the 'New York Journal of Commerce' between the day of sailing of the vessel at point of shipment, and the day the final delivery of the complete cargo would have arrived at destination if casualty had not occurred, both days inclusive." This policy contained the following provision: "Provided always, and it is hereby further agreed, that if the said insured shall have made any other insurance upon the property aforesaid, prior in date to this policy, then this Com-

pany shall be answerable only for so much as the amount of such prior insurance may be deficient towards fully covering the property hereby insured."

Shortly afterwards this wheat, thus insured, was shipped on the Steamship "Glenorchy," part from Fort William and part from Port Arthur, Ontario, destined for Montreal. Two days later said steamship was in collision with another vessel, resulting in the total loss of the cargo, including the said wheat. The first insurer, the appellee, immediately paid the insured the insurance due on its policy, at the agreed rate of $1.42 per bushel, aggregating $284,000.00. The second insurer, the appellant, promptly and voluntarily paid the insured insurance on the basis of the difference between the C. I. F. invoice cost, $1.38½ per bushel, and the highest market value (apparently at Montreal) during the time (apparently ten days) which it was estimated would have been consumed by this voyage if it had not been terminated by the said collision, $1.64¾ per bushel, plus the agreed 5 cents per bushel, or $1.69¾, making the total amount of insurance so paid by the said insurer $62,500.00.

Subsequently, in the present limitation of liability proceedings in the court below, instituted by one of the vessels causing the collision, both vessels were held at fault and the insured recovered damages for the loss of this wheat, based on its actual value at the time and place of shipment thereof, $1.54¾, aggregating $309,500.00, with interest thereon. Both insurers, by intervening petitions in said proceedings, sought to recover, by subrogation to the rights of the insured against the offending vessels, a share in the said fund. The district court held that the first insurer was entitled to be reimbursed, out of this fund, for the entire amount which it had paid to the insured [fol. 110] for the loss of said wheat at the agreed value, $1.42 per bushel, under its policy already mentioned, and that the second insurer was entitled only to the balance remaining in said fund after the payment of the court costs and the amount thus awarded to the first insurer. To review this ruling of the district court the second insurer has brought the case by appeal to this court, claiming that it is entitled, by right of subrogation, to share pro rata with the other insurer in the fund recovered by the insured.

We think it clear that the district court did not err in its disposition of the question here involved. It is settled law that although an insurer who has paid to its insured insurance on a loss is entitled to be subrogated to whatever rights such insured has against a wrongdoer responsible for such loss, yet such right of the insurer is derived from, and is limited to, the rights which the insured has, as against such wrongdoer, with respect to the recovery of such damages for such loss. Phoenix Insurance Co. v. Erie & Western Transportation Co., 117 U. S. 312. The only rights, therefore, which either of these insurers has, under the principle of subrogation invoked by them, against the vessels causing the loss of this wheat or against the fund recovered by the insured from such vessels, are the rights which the insured itself had and on which such recovered was based. The sum of the rights of the insured in that connection is the measure and limit of the rights of these insurers, by subrogation, in this fund.

As, therefore, the amount of damages recoverable (The Vaughan and Telegraph, 14 Wall. 258) and recovered by the insured against the offending vessels was based upon the actual value of this wheat at the time and place of shipment, that is, $1.54¾ per bushel, that sum represents the maximum amount in which the insurers are entitled to share by subrogation. As, then, the appellee paid the insured $1.42 per bushel and the appellant paid the insured the difference between the C. I. F. invoice cost, $1.38½ per bushel, and the value so recovered as damages by the insured, $1.54¾ per bushel, and neither insurer can claim by subrogation any amount in excess of the last-mentioned sum, the fund in question is sufficient to pay each insurer the full amount to which it is entitled from such fund except as to the difference between said invoice cost, $1.38½, [fol. 111] and $1.42, the agreed value paid by the appellee, or 3½¢ per bushel, which sum was paid to the insured by both of the insurers. As, however, under the provisions of the policies already quoted, the appellant was specifically exonerated from liability for the amount of its insurance which was also covered by this prior insurance, while the appellee was expressly required to pay the entire amount of its insurance without regard to insurance by subsequent insurers and "without right to demand contribution

from such subsequent insurers," the appellant, in paying to the insured this 3½¢ per bushel which only the appellee was bound to pay acted as a mere volunteer and is not entitled, at least as against the appellee, to now recover any part of such payment from this fund. Ætna Life Insurance Co. v. Middleport, 124 U. S. 534.

We see no merit in the complaint of the appellant that the court erred in directing that the fee of the Special Commissioner who made a report to said court on the questions here involved should be paid from the fund before payment to the appellant of its share therein.

We agree with the district court that under the principles of subrogation as applied to the circumstances of this case the appellee is entitled to be paid from the fund in controversy the full amount which it paid to the insured and that, after payment of said amount and of the commissioner's fee already mentioned from such fund, the appellant is entitled only to the balance thereof. Whether this disposition of the fund is based upon a right of priority, in the strict sense of the term, of the appellee, or whether it merely happens to result from the fortuitous circumstances already mentioned, is a question which we have no occasion to decide. It is clear that appellee is interested in this fund to the extent of $1.42 per bushel and that appellant is interested therein (by subrogation to the rights of the insured) only to the extent of the difference between $1.42 and $1.54¾. The practical result is that to the extent just indicated each insurer recovers from the fund the full amount to which it is entitled under the doctrine of subrogation, while as to the 3½ cts. below $1.42 and as to the 15 cts. above $1.54¾ (the portions of its insurance not recoverable through subrogation) the appellant has no interest in said fund. The judgment is affirmed with costs.

[fol. 112] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 113] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 13, 1930

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 35,183. U. S. Circuit Court of Appeals, Sixth Circuit. Term No. 261. Standard Marine Insurance Company, Ltd., petitioner, vs. Scottish Metropolitan Assurance Company, Ltd. Petition for a writ of certiorari and exhibit thereto. Filed July 7, 1930. File No. 35,183.

FILE COPY

FILED
JUL 7 1930
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

October Term, 1930.

No. 261

STANDARD MARINE INSURANCE COMPANY, LTD.,
Petitioner,

vs.

SCOTTISH METROPOLITAN ASSURANCE COMPANY, LTD.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

RUSSELL T. MOUNT,
Counsel for Petitioner.

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Supreme Court of the United States

STANDARD MARINE INSURANCE COMPANY, LTD., *Petitioner,* *vs.* SCOTTISH METROPOLITAN ASSURANCE COMPANY, LTD., *Respondent.*	No..... October Term, 1930.
IN THE MATTER *of the* Petition of the COLUMBIA STEAMSHIP COMPANY for Limitation of Liability, as owner of the Steamer LEONARD B. MILLER.	

PETITION FOR A WRIT OF CERTIORARI.

The petition of Standard Marine Insurance Company, Ltd., respectfully shows to this Honorable Court as follows:

A.

Summary Statement of the Matter Involved.

This is a petition by Standard Marine Insurance Company, Ltd., for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit to review that Court's decree (p. 107) and opinion (pp. 108-111) which affirmed a final decree in admiralty of the United States District Court for the Northern District of Ohio,

Eastern Division (pp. 92-94). The District Court's decree had overruled the Special Commissioner's report (pp. 65-86).

The decree of the District Court, affirmed by the Circuit Court of Appeals, distributed between the petitioner and the respondent, two marine insurers of the same cargo of wheat on the *SS. Glenorchy*, both of whom had paid a total loss under their policies, the amount awarded to that cargo against the *SS. Leonard B. Miller*, the colliding vessel, in limitation of liability proceedings brought by the owners of the *SS. Leonard B. Miller*. In that collision, the *SS. Glenorchy* and the cargo in question sank and became a total loss.

Following the total loss, the respondent had paid the owner of the said cargo a total loss under its policy in the sum of $284,000. The petitioner had likewise paid the owner of the said cargo a total loss under its policy in the sum of $62,500. The total payment by both respondent and petitioner was thus $346,500. The amount recovered by the said cargo against the colliding vessel, the *SS. Leonard B. Miller* in the latter's limitation of liability proceedings was only $309,500. The special commissioner held that the two insurance companies, under their subrogated rights, were entitled to share *pro rata* in the $309,500, cargo's recovery against the *SS. Leonard B. Miller* (Paragraph 5, p. 71). It was this holding of the special commissioner which both lower Courts have reversed.

The final decree of the District Court (pp. 92-94), affirmed by the Circuit Court of Appeals (p. 107) directed that out of the $309,500 which represents cargo's recovery against the *SS. Leonard B. Miller*, the respondent, Scottish Metropolitan Assurance Company, Ltd., receive $284,000, the full amount it paid to the cargo owner,

with interest, and the petitioner, Standard Marine Insurance Company, Ltd., receive only the balance (after certain deductions) (pp. 93, 94).

The correctness of the holding of both lower Federal Courts on this point is the sole question raised by this petition.

There is no dispute as to the facts. The facts and the documents involved are stipulated in an agreed statement of facts which appears in the record (pp. 45-64). They are as follows:

By contract dated August 25, 1924, Louis Dreyfus & Company purchased from Canadian Co-Operative Wheat Producers, Ltd., of Winnipeg, for future delivery, 200,000 bushels of wheat, c. i. f. Montreal, at a c. i. f. price of $1.38½ per bushel (pp. 46, 66). These 200,000 bushels of wheat were insured by the seller Canadian Co-Operative Wheat Producers, Ltd., at $1.42 per bushel, making a total insurance taken out by the seller of $284,000 (pp. 46, 66). This insurance was evidenced by two certificates of insurance issued by the respondent to the seller dated October 26, 1924, each certificate covering 100,000 bushels, "valued at $1.42 per bushel. Shipped on board of the Steamer Glenorchy at and from Fort William and/or Port Arthur to Montreal" (pp. 47, 66, 67; Exhibits D and E, pp. 59-63). The valuation in said certificates was 3½ cents above the c. i. f. price. These certificates were delivered with the bills of lading to Dreyfus & Company, the buyer.

The 200,000 bushels of wheat were shipped by Canadian Co-Operative Wheat Producers, Ltd., on the *SS. Glenorchy* at Port Arthur, bound for Montreal, on October 27, 1924, and constituted the greater part of that vessel's cargo.

On October 29, 1924, the *SS. Glenorchy,* with the above cargo on board, was in collision with the *SS. Leonard B. Miller,* as a result of which the *SS. Glenorchy* and her cargo sank and became a total loss (pp. 45, 65). In limitation of liability proceedings filed in the District Court by Columbia Steamship Company, as owner of the *SS. Leonard B. Miller* (pp. 2-7), both vessels were held at fault, and Louis Dreyfus & Company were awarded recovery against the *SS. Leonard B. Miller.* The amount of that recovery was $322,487.65, being based on the market value of the wheat at Port Arthur, the port of loading on the day of loading, at $1.54¼ per bushel (pp. 10-12, 48). This limitation of cargo's recovery against the *SS. Leonard B. Miller* was necessitated by the rule laid down by this Court in *The Vaughan and Telegraph* (1871), 14 Wall. 258, at pp. 267, 268.

The subject-matter of the present dispute between the two insurance companies is the 200,000 bushels, above referred to, the recovery for which, in the final decree, is $309,500 (part of the $322,487.65).

Dreyfus & Company was a buyer of grain and as it could not compel its sellers to cover cargoes by insurance to a greater amount than the c. i. f. *contract price, Tanvaco* v. *Lucas* (1861) 30 L. J. (N. S.) 234; affirmed (1862) 31 L. J. (N. S.) 296, and as in all probability the *actual value* of wheat on shipment and during the lake voyage would exceed the c. i. f. price, Dreyfus & Company had prior to the date of the sale contract in question arranged with the petitioner for insurance on such increased value. The petitioner had accordingly, on July 12, 1924, issued to Louis Dreyfus & Co. its open policy of marine insurance (pp. 23-32). This policy provides for the coverage of two kinds of cargo. Clause 4 of the

policy (p. 30) provides for the coverage of cargo which has *not* been insured by the shipper. Clause 3 (see rider on policy, pp. 27, 28) provides for the coverage of cargo which *has* been insured by the shipper.

The amount of the coverage on shipments which have been insured by the shipper is described in Clause 3 (as amended by rider dated August 1, 1924), as follows:

> "To cover 'INCREASED VALUE' on grain owned by the Assured or in which the Assured may have an interest, such 'INCREASED VALUE,' for the purposes of this insurance, to be arrived at by taking the difference between the C. I. F. invoice cost and the highest market value per bushel, plus 5¢ (Five Cents), as set out in the 'New York Journal of Commerce' between the day of sailing of the vessel at point of shipment, and the day of the final delivery of the complete cargo at destination as named in the Certificate, both days inclusive; and in the event of casualty to be valued at the difference between the C. I. F. invoice cost and the highest market value per bushel, plus 5¢ (Five Cents) as set out in the 'New York Journal of Commerce' between the day of sailing of the vessel at point of shipment, and the day the final delivery of the complete cargo would have arrived at destination if casualty had not occurred, both days inclusive. Advice of all such shipments to be mailed to the Company, 64 King Street East, Toronto, Ontario, Canada, by registered letter on day of sailing of the vessel, or as soon thereafter as practicable."

The $62,500 paid by the petitioner to Louis Dreyfus & Company was in fact due from it to Dreyfus & Company under its policy (pp. 48, 69), and was arrived at as follows:

Highest market value on October 27th, $1.64¾ per bushel, plus 5 cents	$	1.69¾
C. I. F. invoice value per bushel		1.38½
Increased value per bushel	$	.31¼

200,000 bushels at 31¼ cents per bushel ... $62,500.00 (p. 69).

After entry of final decree in the limitation of liability proceedings, both petitioner and respondent filed petitions of intervention for their interests, by subrogated rights, in the fund represented by the bond or stipulation for value of the *SS. Leonard B. Miller.*

To make the matter clear, it is necessary to point out the various prices and/or values of the cargo per bushel, as follows:

Invoice *price,* fixed by contract of August 25, 1924	$1.38½ per bu.
The *valuation* agreed on in the shipper's insurance under its open policy with the Scottish Metropolitan Co.	1.42 " "
The *actual market value* of the wheat *at the port of shipment* on October 27, 1924, the date of shipment, two months after the date of contract of sale	1.54¾ " "
The above *market value* at port of shipment was 16¼ cents above the contract *price.*	
The *market value,* as quoted in the New York Journal of Commerce on October 29, 1924	1.64¾ " "
Add $.05 to the above, as per clause 3 of petitioner's policy	1.69¾ " "
The amount of Dreyfus & Company's "increased value" insurance on the cargo ($1.69¾ less $1.38½)	.31¼ " "

The petitioner's insurance was insurance on cargo, and on actual value thereof. The petitioner's policy, copy of which appears at pp. 23-32 of the printed record, bears the words, "Lake Cargo" on the upper left-hand corner of the first page.

The first paragraph of the policy reads:

> "Do make insurance and cause * * * to be insured upon all kinds of Lawful Goods, Wares, Merchandise and Produce laden on board the good vessel or vessels, etc." (p. 23);

and the second paragraph of the policy reads:

> "Beginning the adventure *upon the said property*, etc." (p. 23). (Italics ours.)

The use of the words "increased value" in clause 3 of the policy was necessary to properly describe the *amount* of the coverage where the shipper had, under its c. i. f. contract, taken out insurance to the extent of the c. i. f. price. As Dreyfus & Company could not call on the seller to insure for more than the c. i. f. price, Dreyfus & Company's insurance with the petitioner on "increased value" was the *only way* whereby Dreyfus & Company could keep shipments of grain, made to them under c. i. f. contracts, fully covered by insurance.

Both lower courts have treated the petitioner's insurance as though it were insurance, not on cargo, but on the cargo owner's ability to collect up to $1.69¾ per bushel from a wrongdoer.

There is no connection between the law, established by this Court, which limits the amount of recovery for totally lost cargo against a wrongdoing vessel, and the rights of cargo underwriters by way of subrogation to the fund representing that recovery.

B.

Reasons Relied on for the Allowance of the Writ.

The decision in the present case is in direct conflict with the decision of the Circuit Court of Appeals for the Ninth Circuit in *Brown et al.* v. *Merchants Marine Insurance Co., Ltd., et al.* (1907 C. C. A. 9 C.), 152 Fed. 411, where that Court held that where Underwriters have paid the insured a total loss under their policies, the underwriters on "increased value" share *pro rata* with other underwriters in the fund recovered from the wrongdoer.

In that case, the *SS. City of Kingston* was insured by various insurance companies against all risks under separate policies, in each of which the vessel was valued at $75,000. Two other insurance companies issued to the owners of the *SS. City of Kingston* two policies aggregating $12,200 "on disbursements and/or increased value," the insurance being against total loss only and warranted free from all average and salvage charges, and containing a policy proof of interest clause. In addition to all of the above policies the St. Paul Fire & Marine Insurance Company insured the vessel in the sum of $4,800 against total loss only, no valuation being inserted in that policy.

During the pendency of all of the above policies, the *SS. City of Kingston* was in collision with the *SS. Glenogle,* and was sunk. All of the underwriters on hull, together with the St. Paul Fire & Marine Insurance Company, paid a total loss and at the request of these underwriters the owner of the *SS. City of Kingston* brought suit to recover damages from the owners of the *SS. Glen-*

ogle. On the trial, the Court found the actual value of the *SS. City of Kingston* was $140,000, that both vessels were in fault, and decreed division of damages. The result was that $67,472.96 was paid into court for the owners of the *SS. City of Kingston.* After payment of costs of the suit, the net amount left in the registry of the court was $47,426.97, for distribution among the insurance companies who were entitled to receive the same.

At this point, the two insurers "on disbursements and/or increased value" intervened, alleging that they had paid a total loss and were entitled to share *pro rata* with all the other underwriters in the fund in court. The District Court sustained this position and made *pro rata* distribution of the funds to all the underwriters.

On appeal the decision was affirmed, the Circuit Court of Appeals expressly overruling the contention of the hull underwriters that because they had insured the *SS. City of Kingston* in the sum of $75,000 in policies which valued her at that sum, they were entitled to be subrogated to that amount in the award to the owner of the *SS. City of Kingston,* and the contention that the insurers on "disbursements and/or increased value" were not entitled to share in the fund.

At page 413, the Circuit Court of Appeals said:

> "The assured in the policies issued by the appellees was in fact the owner of the property insured, and could undoubtedly have recovered on the policies. Such being the case, we are unable to discover any recognized principle of law or equity on which it should be held that the appellees are not entitled to rank equally with the other underwriters in the distribution of the fund in court."

The award to the insurers on "disbursements and/or increased value" was $4,132.92 (p. 412). The calculation of that award, although not worked out in the opinion, is necessarily as follows:

Valued hull policies	$ 75,000.00
Disbursements and/or increased value insurance	12,200.00
Unvalued hull policies	4,800.00
Owner, co-insurer for	48,000.00
The total interests in the vessel	$140,000.00

There was $47,426.97 for distribution.

The disbursements and increased value insurance received

$$\frac{12,200}{140,000} \times \$47,426.97 = \$4,132.90$$

If in the present case of *The Glenorchy*, the same law and the same method of calculation had been applied, the result would be:

Valued policy of Scottish Company	$284,000.00
"Increased value" policy of Standard Company	62,500.00
Total interests in the 200,000 bushels of wheat	$346,500.00

There is $309,500 for distribution.

The "increased value" insurance should receive

$$\frac{62,500}{346,500} \times \$309,500 = \$55,826.10.$$

Under the decree of the Circuit Court of Appeals as it now stands, the petitioner will receive only about $24,000.

In addition to the conflict in the decisions of the Sixth and Ninth Circuits, as to the basis on which "increased value" insurance shares by subrogated right in the fund recovered by the assured from the wrongdoer, *certiorari* is requested in this case on the further ground that the case involves a question of marine insurance of great importance, to all sellers, buyers and insurers of c. i. f. shipments, particularly that very great volume of c. i. f. shipments of grain on the Great Lakes, which question it is respectfully submitted should be settled by this Court.

Purchasers of grain under c. i. f. contracts cannot compel the sellers of such grain to insure it for more than the c. i. f. price. *Tanvaco* v. *Lucas*, (1861) 30 L. J. (N. S.) 234; affirmed (1862) 31 L. J. (N. S.) 296. The purchasers do not know with what company the sellers carry their insurance. The grain is not shipped until some time after the date of the c. i. f. contract,—in the present case the shipment not being made until two months after the date of the contract. As therefore, *the actual market value* of the grain, when it becomes the property of the purchaser on shipment some time after the contract of sale, is in excess of the c. i. f. price, the only way by which the purchaser can keep his cargo covered up to its actual market value, is to take out insurance based on "increased value". There is nothing speculative in such insurance.

The present case involves a question affecting not only the enormous grain trade on the Great Lakes, but also the grain trade and other trades involving shipments either to or from American ports made under c. i. f. contracts.

It is respectfully submitted that the important question of marine insurance involved in this case should be settled by this Court, not only on the ground of its importance, but also on the ground of conflict between the decisions of the Sixth and the Ninth Circuits.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Sixth Circuit, commanding that Court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record in all proceedings in the case numbered and entitled on its docket No. 5352, *Standard Marine Insurance Company, Ltd.*, v. *Scottish Metropolitan Assurance Company, Ltd.*, and that the said decree of the United States Circuit Court of Appeals for the Sixth Circuit may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

STANDARD MARINE INSURANCE COMPANY, LTD.,
By RUSSELL T. MOUNT,
Counsel for Petitioner.

Supreme Court of the United States

STANDARD MARINE INSURANCE COMPANY, LTD., *Petitioner*, *against* SCOTTISH METROPOLITAN ASSURANCE COMPANY, LTD., *Respondent.*	No..... October Term, 1930

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

The Opinions of the Courts Below.

The opinion of the United States District Court for the Northern District of Ohio, Eastern Division (89-91) rendered under date of July 18, 1928, is reported in 28 Fed. (2nd) 540.

The opinion of the United States Circuit Court of Appeals for the Sixth Circuit (108-111) rendered under date of April 7, 1930, is reported in 39 Fed. (2nd) 436.

II.

Jurisdiction.

1. The date of the judgment entered herein by the United States Circuit Court of Appeals for the Sixth

Circuit, affirming the decree of the District Court, is April 7, 1930 (p. 107).

2. This is a proceeding within the admiralty and maritime jurisdiction of the United States and of this Honorable Court, and involves a question of maritime insurance.

3. The jurisdiction of this Court is invoked under section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 936, and under Article 3, section 2 of the Constitution of the United States.

III.

Statement of the Case.

Inasmuch as a statement of the case has been necessarily given under heading A in the petition, a restatement of the case is omitted here in the interest of brevity.

IV.

Specification of Errors.

The United States Circuit Court of Appeals for the Sixth Circuit erred in holding that the petitioner was not entitled to share *pro rata* with the respondent in the fund of $309,500, the amount of the recovery awarded to Dreyfus & Company as owner of 200,000 bushels of wheat lost on the *SS. Glenorchy,* sunk in collision with the *SS. Leonard B. Miller,* and in holding that the respondent should receive full reimbursement of $284,000 from the said fund of $309,500, and that your petitioner was only entitled to receive the balance of such fund after such payment in full of $284,000 to the respondent.

V.

Argument.

FIRST POINT.

The petitioner's insurance was insurance on cargo and on actual value thereof. It was not insurance on profits.

The Standard Company's policy, copy of which is annexed to the amended petition of the Standard Company (Schedule A, pp. 23-32), bears the words "LAKE CARGO" on the upper left-hand corner of the first page.

The first paragraph of the policy reads:

> "Do make insurance and cause * * * to be insured upon all kinds of Lawful Goods, Wares, Merchandise and Produce laden on board the good vessel or vessels, etc." (p. 23);

and the second paragraph of the policy reads:

> "Beginning the adventure *upon the said property*, etc." (p. 23). (Italics ours.)

The Standard Company's policy provides for the coverage of two kinds of cargo: First, cargo which has *not* been insured by the shipper, and, second, cargo which *has* been insured by the shipper. Typewritten clause 4 of the policy (p. 30) provides the amount of the insurance coverage on shipments which have not been insured by the shipper, such shipments to be valued at an amount to be declared prior to sailing. That clause reads as follows:

"To cover all shipments of grain owned by the assured, or in which the assured may have an interest and *not insured by the shipper*, such shipments to be valued, for the purposes of this insurance, at amount declared, such amount declared and advices of such shipments to be mailed to the company, 64 King Street, East, Toronto, Ontario, Canada, by registered letter prior to sailing of the vessel" (pp. 30, 68). (Italics ours.)

Typewritten clause 3 (endorsement, dated August 1, 1924, pp. 27, 28), provides for the amount of coverage on shipments which *have* been insured by the shipper (that is c. i. f. shipments). Clause 3 reads:

"To cover 'INCREASED VALUE' on grain owned by the Assured or in which the Assured may have an interest, such 'INCREASED VALUE' for the purposes of this insurance, to be arrived at by taking the difference between the C. I. F. invoice cost and the highest market value per bushel, plus 5¢ (Five Cents) as set out in the New York Journal of Commerce, between the day of sailing of the vessel at point of shipment and the day of final delivery of the complete cargo at destination as named in the certificate, both dates inclusive; and in the event of casualty, to be valued at the difference between the C. I. F. invoice cost and the highest market value per bushel, plus 5¢ (Five Cents) as set out in the New York Journal of Commerce between the day of sailing of the vessel at point of shipment, and the day and the final delivery of the complete cargo would have arrived at destination if casualty had not occurred, both days inclusive. Advice of all such shipments to be mailed to the company, 64 King Street, East, Toronto, Ontario, Canada, by registered letter on day of sailing of the vessel, or as soon thereafter as practicable" (pp. 27, 28).

The use of the words "increased value" in clause 3 of the policy was necessary to properly describe the *amount* of the coverage where the shipper had, under its c. i. f. contract, taken out insurance to the extent of the c. i. f. price.

The differing provisions of clause 4 and clause 3 of the Standard Company's policy do not change the *kind* of insurance; they simply provide for a different *amount* of the same kind of insurance. *i. e.*, insurance on cargo. The Commissioner pointed this out at the bottom of page 83 of the record.

Dreyfus & Company, engaged in the business of purchasing grain under c. i. f. contracts, cannot compel the sellers and shippers of such grain to insure it for more than the c. i. f. price. *Tanvaco* v. *Lucas*, (1861) 30 L. J. (N. S.) 234; affirmed (1862) 31 L. J. (N. S.) 296. Moreover, Dreyfus & Company do not know with what company the sellers carry their insurance. The grain is not shipped until some time after the date of the c. i. f. contract. In the present case the grain was not shipped until two months after the contract. As, therefore, the *actual market value* of the grain, when it becomes the property of Dreyfus & Company on shipment some time after the date of the contract of sale, is in excess of the c. i. f. *price*, Dreyfus & Company carried the open policy with the petitioner for insurance on this "increased value." As Dreyfus & Company could not call on the seller to insure for more than the c. i. f. price, Dreyfus & Company's insurance with the petitioner on "increased value" was the *only way* whereby Dreyfus & Company could keep shipments of grain, made to them under c. i. f. contracts, fully covered by insurance.

If Dreyfus & Company had been both shipper and consignee, Dreyfus & Company could, as the value of wheat increased, have arranged with their insurer to increase the valuation in its policy; the insurance would then have been in one company, and following the sinking of the cargo that insurance company would have been subrogated to the cargo's rights against the *SS. Leonard B. Miller.* The fact that, from the necessity of the case, Dreyfus & Company were obliged to take out insurance in another company to cover the increase in value of the wheat cannot change the fact that both insurances were on cargo.

The market value on October 29, 1924, $1.64¾, was not a value quoted at either port of shipment or port of delivery, but was the market value quoted in the New York Journal of Commerce. This market value was 26¼ cents *in actual value* above the contract *price.* The additional 5 cents, which made up the valuation and limit of coverage in the petitioner's policy, was obviously to provide for a slight margin in case there was a slight error between the New York *quotation* and the *actual market value* of the cargo en route to Montreal. It should be noted that this 5 cents was 3 per cent. of the market value as quoted in the New York Journal of Commerce, and does not make the insurance speculative, any more than the additional 3½ cents above the c. i. f. price (3½ cents is 2½ per cent. of the c. i. f. price) in the respondent's policy makes that policy speculative.

That the petitioner's insurance on Dreyfus & Company's cargo was insurance on actual value, is perfectly clear if we assume that Dreyfus & Company were going

to use the cargo to fill a contract for export shipment from Montreal. Assuming that such was the case, then Dreyfus & Company, on the loss of the *Glenorchy* on October 29, 1924, would be obliged to replace the lost cargo, and in purchasing another cargo to replace the lost cargo, Dreyfus & Company would be obliged to pay the then market value of grain, which market value according to the quotation in the New York Journal of Commerce was $1.64¾ per bushel. There can be no doubt that that was the *minimum* actual market value of the grain on the date of the loss, and that at least that much would have had to be paid to replace the cargo which was lost. *The grain could not be replaced at the c. i. f. contract price of August 25, 1924.*

The Courts below erred in reasoning that because the valuation in the petitioner's policy was a figure greater than the value at the point of shipment, whereas the award to Dreyfus & Company, as owner of the cargo, against the *SS. Leonard B. Miller* was limited by law to the market value at the point of shipment, the petitioner's insurance was not on the cargo but on the price at the point of delivery; and that, therefore, the petitioner did not have an equal right of subrogation with the respondent.

The limit of legal recovery in favor of the cargo owner against the *SS. Leonard B. Miller* has been fixed by decisions of this Court and the lower Federal Courts as the market value at the point of shipment on the day of shipment, plus the expenses of getting the cargo to the point of sinking. *The Vaughan and Telegraph* (1871), 14 Wall. 258, 267; *The Ocean Queen* (1867, C. C.

S. D. N. Y.), 5 Blatch. 493; *The Aleppo* (1874, D. C. S. D. N. Y.), 7 Ben. 120, 129, 130; *The Oceanica* (1907, D. C. W. D. N. Y.), 156 Fed. 306, 307. There is, however, no connection between that rule of law, which limits the amount of recovery against a wrongdoing vessel, and the rights of subrogation to the fund representing that recovery.

As Dreyfus & Company, in order to replace the lost cargo would have to pay at least $1.64¾ per bushel, it seems clear that certainly up to that amount, even if not to the full $1.69¾, the petitioner's policy was insurance on *actual value* of the wheat. The fact that the value on delivery at Montreal would probably have been approximately the same as the value *en route,* does not make the petitioner's policy insurance upon the price on delivery. Certainly the spread between $1.38½ (the c. i. f. price) and $1.54¾ (the market value at Port Arthur) had nothing whatever to do with the price on delivery.

The holding of the lower Courts in this case amounts to this:

Suppose goods worth $200,000, insured by the shipper under a c. i. f. contract for $150,000 in insurance company A, and insured by the purchaser for $50,000 on increased value in insurance company B, are totally destroyed in transit and the carrier is liable, but because of the bill of lading valuation clause the recovery against the carrier is limited to $100,000. The lower Courts on their reasoning would hold that insurance company B had no subrogated rights to the fund recovered against the carrier, because the owner of the goods could not recover against the carrier more than $100,000. That proposition is clearly untenable.

It therefore seems clear that the petitioner's insurance on increased value was insurance *on the cargo*, and on the *actual value* of the cargo, which value was of course greater than the contract price of August 25, 1924, two months earlier. The petitioner's insurance was not insurance on the price at the point of delivery, but was insurance on the value of the cargo day by day as a cargo *en route* to Montreal.

The fact that the respondent's certificates of insurance stated the valuation of the 200,000 bushels as $284,000 merely means that the respondent's limit of liability in case of total loss was $284,000; just as the valuation in the petitioner's policy means that the petitioner's limit of liability in case of total loss was the difference between the c. i. f. price and the highest market price, plus five cents, as quoted in the New York Journal of Commerce between the day of sailing and the day the cargo would have arrived at destination if casualty had not occurred. The Courts below apparently felt that the valuation in the respondent's policy gave it a prior right of subrogation over the petitioner, but it is clear that in both policies the valuation merely fixes the maximum liability in case of total loss.

In the decision of this Court in *Gulf Refining Co.* v. *Atlantic Mutual Insurance Co.* (1929), 279 U. S. 708, Mr. Justice STONE, in delivering the opinion of the Court, said at page 712:

> "The policy agreement valuing the cargo at a specified amount is not a representation, or so regarded. It is no more than a *stipulation*, in effect, that *for purposes of computation of the insurance liability* the cargo shall be taken at an agreed value." (Italics ours.)

Nor was the petitioner's policy insurance on profits. In the Courts below, the respondent argued that the insurance provided for in Clause 3 of the petitioner's policy was insurance "on profits", and cited *Canada Sugar Refining Co.* v. *Insurance Co. of North America,* (1900), 175 U. S. 609. It should be pointed out that in that case the policy expressly described the insurance as "$15,000 *on profits* on cargo sugar; against total loss only; valued at the sum insured" (p. 613). That case and the other cases involving insurance on profits—*The Patapsco Insurance Co.* v. *Coulter,* 3 Peters, 222, and *O'Brien* v. *North River Insurance Co.* (1914 C. C. A. 4 C) 212 Fed. 102, all point out that insurance on profits, although legal, is *speculative insurance,* there being no burden on the assured in case of loss to show that there was in fact any market at the point of destination.

There was nothing speculative about the insurance provided for in Clause 3 of the petitioner's policy. The amount of insurance provided by that clause was based on *real value,* and actually fluctuated up and down according as the New York quotation of the market increased or decreased. No method of arriving at a valuation could more closely approximate *actual value* than the provision in Clause 3 of the petitioner's policy.

In its brief in the Circuit Court of Appeals the respondent cited the English case of *Strass* v. *Spillers & Bakers, Ltd.* L. R. (1911) 2 K. B. 759, and quoted from the opinion in that case certain language to the effect that policies on increased value are not the *ordinary kind* of cargo policies. The case, however, does not hold that policies on increased value are not cargo policies, but to the contrary the facts stated in the opinion show that

the policies on increased value on a cargo of grain were paid their proportion of loss as were the usual form of cargo policies, the only question decided being who was entitled to the amounts paid under the increased value policies. The facts were that by contract dated December 30, 1908, the defendants brought from Dewar & Webb a cargo of wheat c. i. f. the contract providing "seller to give policies of insurance (free of war risk) for 2% over the invoice amount, and any amount over this to be for seller's account, in case of total loss only". On February 2, 1909, the plaintiff by contract in similar terms purchased from Messrs. Allatini a cargo of wheat of the same crop per the sailing ship *Leon Bureau* and received from Messrs. Allatini a policy on the cargo for £21,300 dated February 16, 1909. The market price of wheat having risen since February 2d, the plaintiff on February 9th effected a policy on increased value of the wheat for £2000 with the London Assurance Corporation and a second increased value policy on February 27 for £2000 with the British & Foreign Marine Insurance Co. These increased value policies were without benefit of salvage and were warranted free from average unless general, or the ship be stranded.

On March 16, 1909, the plaintiff re-sold the cargo to Messrs. Allatini at an increase in price and on the same day Dewar & Webb bought the cargo from Messrs. Allatini in order to fulfill their contract of December 30, 1908, with the defendants. In view of the increase in contract price, the plaintiff was obliged to hand to Messrs. Allatini on re-sale to them additional insurance to the extent of £1508. He therefore had the increased value policy of the British & Foreign Marine Insurance Company divided into two policies of £1508 and £492 and handed

to Messrs. Allatini the policy for £1508, retaining the one for £492 as well as the increased value policy for £2000 effected with the London Assurance Corporation.

On the voyage the carrying vessel struck a rock and had to be beached, and in consequence the cargo sustained a particular average and a general average loss. Adjustment was made and the losses were paid on the policies handed over to Dewar & Webb and by them handed over to the defendants, but these policies did not include the two retained by the plaintiff, namely, the increased value policies for £2000 and £492, respectively.

Subsequently, the plaintiff sent those two policies to Messrs. Allatini to be sent by them to the receivers of the cargo for presentation to the adjuster; and following this, the underwriters paid to the defendants under those policies £524 and £128, respectively; and the defendants refused to turn those amounts over to the plaintiff.

The Court pointed out that because of the particular terms of the two policies in question they were "not in the ordinary sense a mere insurance on cargo; and to pay in case of general average not *pari passu* with all other portions of the cargo and all *other policies on cargo*, but only in a particular way; it is warranted free from particular average; and finally it is without benefit of salvage" (p. 768).

The Court did not hold that the "increased value" policies were not insurance on cargo. All it held was that the two policies in question belong to the plaintiff and not to the defendants, and it should be noted that the "increased value" policy for £1508, which was not the subject of suit, but which had been handed to the defendants together with the *other policies on cargo*, re-

ceived its share of loss payment with the *other cargo policies*. The two "increased value" policies which were the subject of the suit likewise were paid by the underwriters as cargo policies. The only question decided by the case was the person entitled to the proceeds of those two particular "increased value" policies.

The respondent also cited in the Court below the case of *Loders and Nucoline, Ltd.*, v. *The Bank of New Zealand* (1929, Kings Bench Division) reported only in 33 Lloyd's List Law Reports 70. All that case held was that under a c. i. f. contract for the sale of copra, which called for insurance by the seller in the sum of £8587/10 the seller did not fulfill his obligation by tendering to the buyer policies on cargo to the extent of £7612/10 and additional policies for £975 on "freight payable at destination", merely by having the last mentioned policies worded:

> "on freight payable at destination, being increased value of copra through payment of freight or from such time as freight becomes due at destination, this insurance being deemed to be part of the total amount insured on the copra valued at such total amount."

The vessel was lost on the voyage, and as the freight was not due by the bills of lading until delivery at destination, the buyers were not able to collect from insurers on the £975 on "freight payable", and the sellers were therefore held liable to make good this deficiency of insurance. There is nothing in that case which bears on the present case.

SECOND POINT.

Where underwriters have paid the insured a total loss under their policies, the underwriters on "increased value" share pro rata with other underwriters in the fund recovered from the wrongdoer. The decision of the Circuit Court of Appeals in this case is in conflict with the decision of the Circuit Court of Appeals for the Ninth Circuit in *Brown et al.* v. *Merchants Marine Insurance Co., Ltd., et al.*, 152 Fed. 411.

We have already pointed out at page 18 that if Dreyfus & Company had been both shipper and consignee, they could, as the value of wheat increased, have arranged with their insurer to increase the amount of its policy; the insurance would then have been in one company, and following the sinking of the cargo, that insurance company would have been subrogated to the cargo's rights against the *SS. Leonard B. Miller.* The fact that, from the necessity of the case, Dreyfus & Company were obliged to take out insurance in another company to cover the actual increase in market value of the wheat on its becoming their property, cannot change the fundamental principle of subrogation, viz.: in the case of a single insurer, it steps into the shoes of the assured vis-a-vis the wrongdoer; if more than one insurer covers the property they *jointly* step into the shoes of the assured vis-a-vis the wrongdoer. In the supposed instance, the single insurance company would have had the entire rights of subrogation against the *SS. Leonard B. Miller;*

in the actual facts of this case, the two insurance companies are jointly subrogated to those rights.

This is true not only as a matter of principle, but as a matter of law. This was specifically held in *Brown et al.* v. *Merchants Marine Insurance Co., Ltd., et al.* (1907 C. C. A. 9 C.), 152 Fed. 411. As the *Brown* case is fully discussed at pages 8-10 of the accompanying petition, the digest of its facts is not here repeated.

If the basis of *pro rata* sharing by "increased value" insurance laid down in the *Brown* case is applied in the present case, the petitioner will receive approximately $55,000 instead of approximately $24,000.

CONCLUSION.

It is respectfully submitted that in view of the importance of the question of marine insurance involved in this case, and in view of the conflict between the present decision and the decision of the Circuit Court of Appeals for the Ninth Circuit in *Brown et al.* v. *Merchants Marine Insurance Co., Ltd.*, a writ of certiorari should be granted so that this Court may review the decision of the United States Circuit Court of Appeals for the Sixth Circuit.

RUSSELL T. MOUNT,
Counsel for Petitioner.

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Supreme Court of the United States

October Term, 1930.

No. 261.

STANDARD MARINE INSURANCE COMPANY, LTD.,
Petitioner,

vs.

SCOTTISH METROPOLITAN ASSURANCE COMPANY, LTD.,
Respondent.

BRIEF ON BEHALF OF PETITIONER ON WRIT OF CERTIORARI.

RUSSELL T. MOUNT,
Counsel for Petitioner.

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Supreme Court of the United States

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No. 261.

STANDARD MARINE INSURANCE COMPANY, LTD.,
Petitioner,

against

SCOTTISH METROPOLITAN ASSURANCE CO., LTD.,
Respondent.

BRIEF ON BEHALF OF PETITIONER ON WRIT OF CERTIORARI.

I.

Jurisdiction.

This case comes before this Court on writ of *certiorari* to the United States Circuit Court of Appeals for the Sixth Circuit, granted by this Court October 13, 1930 (282 U. S. V.). The case is within the admiralty and maritime jurisdiction of the United States and of this Honorable Court, and involves a question of marine insurance.

The final decree of the United States Circuit Court of Appeals for the Sixth Circuit, filed April 7, 1930 (R. 97), affirmed a decree of the United States District Court for the Northern District of Ohio, Eastern Division, which appears

at pages 88-91 of the printed record. The decree of the District Court, affirmed by the Circuit Court of Appeals, distributed between the petitioner and the respondent herein, two insurers of the same cargo on the *SS. Glenorchy*, both of whom had paid a total loss under their policies, the amount awarded to that cargo against the *SS. Leonard B. Miller*, the colliding vessel, in limitation proceedings brought in the United States District Court for the Northern District of Ohio. The distribution decreed by both lower Courts between the petitioner and the respondent was not *pro rata*.

II.

The Opinions of the Courts Below.

The opinion of the United States District Court for the Northern District of Ohio, Eastern Division, printed in this record at pages 86-88, rendered under date of July 18, 1928, is reported under the title *In re Columbia S. S. Co.* in 28 Fed. (2nd) 540.

The opinion of the United States Circuit Court of Appeals for the Sixth Circuit, printed in this record at pages 97-101, rendered under date of April 7, 1930, is reported under the title *Standard Marine Insurance Co., Ltd.* v. *Scottish Metropolitan Assurance Co., Ltd.*, in 39 Fed. (2nd) 436.

The allowance of writ of *certiorari* by this Court on October 13, 1930, is reported in 282 U. S. V.

III.

Statement of the Case.

There is no dispute as to the facts. The case involves a question of law. The facts and the documents involved are stipulated in an agreed statement of facts which appears in the record (R. 41-61, incorporating petitioner's policy of insurance printed at pages 20-29). The facts are as follows:

By contract dated August 25, 1924, Louis Dreyfus & Company purchased from Canadian Co-operative Wheat Producers, Ltd., of Winnipeg, *for future delivery*, 200,000 bushels of wheat c. i. f. Montreal, at c. i. f. price of $1.38½ per bushel, making the total c. i. f. price of 200,000 bushels $277,000 (R. 42). Thereafter, on October 27, 1924, the Canadian Co-operative Wheat Producers, Ltd., shipped the 200,000 bushels of wheat in fulfillment of this c. i. f. contract on the *SS. Glenorchy* at Port Arthur for delivery at Montreal (R. 42).

This 200,000 bushels of wheat was insured by the shipper, Canadian Co-operative Wheat Producers, Ltd., at $1.42 per bushel, making a total insurance taken out by the shipper of $284,000 (R. 42). This insurance was taken out by the shipper with the Scottish Metropolitan Assurance Company, Ltd., the respondent, under the respondent's open policy dated February 22, 1924 (R. 43, Exhibit "C", 46-56), and was evidenced by two certificates of insurance issued by the respondent to the shipper, dated October 26, 1924, each certificate covering 100,000 bushels "valued at $1.42 per bushel. Shipped on board of the steamer *Glenorchy* at and from Fort William and/or Port Arthur to Montreal" (R. 43, Exhibits "D" and "E", 56-

59). The policy provided that the insurance was "for account of whom it may concern" (R. 53). The valuation in the said two insurance certificates was 3½¢ above the c. i. f. price.

The said policy defined the beginning of the risk as "beginning the adventure upon the said goods from and immediately following the loading thereof on said vessel at as per form * * *" (R. 47). The two insurance certificates were endorsed and delivered with the bills of lading to Dreyfus & Company, the buyer (R. 44).

The 200,000 bushels of wheat were shipped by Canadian Co-operative Wheat Producers, Ltd., on the *SS. Glenorchy* at Port Arthur bound for Montreal on October 27, 1924, and constituted the greater part of that vessel's cargo (R. 42, 43). The total cargo on the *SS. Glenorchy* was 208,392-40/60 bushels (R. 44). The additional 8,392-40/60 bushels remained the property of the shipper and were also covered by insurance of the respondent, but are not involved in this dispute.

Dreyfus & Company, engaged in the grain business, had, prior to the date of the sale contract in question, taken out with the petitioner an open policy of insurance on July 12, 1924 (R. 43). A copy of that open policy is printed in the record at pages 20-29. This policy provides for the coverage of two kinds of cargo. Clause 4 of the policy (R. 27) provides for the coverage of cargo which has *not* been insured by shipper. Clause 3 of the policy (see rider on policy, dated August 1, 1924, R. 25, which superseded the original Clause 3, at R. 27) provides for the coverage of cargo which *has* been insured by the shipper.

The amount of the coverage on shipments which have been insured by the shipper is described in Clause 3 (as amended by rider dated August 1, 1924), as follows:

"To cover 'INCREASED VALUE' on grain owned by the Assured or in which the Assured may have an interest, such 'INCREASED VALUE,' for the purposes of this insurance, to be arrived at by taking the difference between the C. I. F. invoice cost and the highest market value per bushel, plus 5¢ (Five Cents), as set out in the 'New York Journal of Commerce' between the day of sailing of the vessel at point of shipment, and the day of the final delivery of the complete cargo at destination as named in the Certificate, both days inclusive; and in the event of casualty to be valued at the difference between the C. I. F. invoice cost and the highest market value per bushel, plus 5¢ (Five Cents) as set out in the 'New York Journal of Commerce' between the day of sailing of the vessel at point of shipment, and the day the final delivery of the complete cargo would have arrived at destination if casualty had not occurred, both days inclusive. Advice of all such shipments to be mailed to the Company, 64 King Street East, Toronto, Ontario, Canada, by registered letter on day of sailing of the vessel, or as soon thereafter as practicable."

On October 29, 1924, the *SS. Glenorchy* with the above cargo on board was in collision with the *SS. Leonard B. Miller* as a result of which the *SS. Glenorchy* and her cargo sank and became a total loss (R. 41). Suit was brought by Louis Dreyfus & Company as owner of the said cargo on the *SS. Glenorchy* against the *SS. Leonard B. Miller*, and thereafter a petition for limitation of liability was filed in the United States District Court for the Northern District of Ohio, Eastern Division, by Columbia Steamship Company, as owner of the *S. S. Leonard B. Miller* (R. 1-6).

On the trial of the limitation proceedings, both vessels were held at fault, and Louis Dreyfus & Company were

awarded recovery against the *SS. Leonard B. Miller*. The amount of that recovery was fixed by agreement of the parties and was embodied in the final decree at $332,487.65, being based on the market value of the wheat *in store* at Port Arthur, the port of loading, at $1.54¾ per bushel (R. 8, 10, 44). This limitation of the amount of cargo's recovery against the *SS. Leonard B. Miller* was necessitated by the rule laid down by this Court in *The Vaughan and Telegraph* (1871), 14 Wall. 258, at pages 267 and 268. The above amount carries interest at 5% per annum from October 29, 1924.

The subject matter of the present dispute between the petitioner and the respondent is the 200,000 bushels above referred to, the recovery for which in the final decree is $309,500, *i. e.*, part of the $322,487.65 (R. 44).

In view of the shortness of time between the shipment of the cargo on October 27th and its loss on October 29th, Dreyfus & Company, as assured under the petitioner's policy, made a declaration of the shipment and a preliminary claim for loss in a letter from Dreyfus & Company's brokers to the Toronto Insurance & Vessel Agency, agent of the Standard Marine Insurance Company, Ltd., dated October 30, 1924 (R. 43; Exhibit F, 60). Final claim of Dreyfus & Company for loss under this policy is set out in Exhibit G, dated October 31, 1924 (R. 43, 60, 61).

On November 3, 1924, Scottish Metropolitan Assurance Company, Ltd., paid Dreyfus & Company the sum of $284,000, which amount was in fact due under its policy (R. 43). This payment was made on its two insurance certificates, Exhibits D and E (R. 56-59), which had in due course been endorsed to Louis Dreyfus & Company (R. 43, 44).

On November 28, 1924, the Standard Marine Insurance Company, Ltd., paid to Louis Dreyfus & Company the sum

of $62,500, which amount was in fact due from it to Dreyfus & Company under its policy (R. 44). This amount was arrived at as follows:

Highest market value on October 27th, $1.64¾ per bushel, plus 5¢	$1.69¾
C. I. F. invoice value per bushel	1.38½
Increased value per bushel	$ .31¼
200,000 bushels at 31¼¢ per bushel (R. 61).	$62,500.00

The claim on behalf of Louis Dreyfus & Company in the limitation proceedings was handled by the attorneys for the respondent, who refused to admit the petitioner's right to share *pro rata* in cargo's recovery in the limitation proceedings. After entry of final decree in those limitation proceedings, therefore, a petition of intervention was filed by the petitioner, "intervening for its interest, by subrogated rights, in the fund in Court in the above-entitled cause, represented by the bond or stipulation for value of the *SS. Leonard B. Miller*" (R. 16-20). This petition was answered by the respondent (R. 29-33). Thereafter a petition of intervention was filed by the respondent intervening for its interest by way of subrogation in the said recovery (R. 33-37). The petitioner filed an answer to that petition (R. 38, 39).

On April 20, 1927, an order was entered referring to a Special Commissioner the issues raised by the two petitions, viz., the respective rights of the petitioner and the respondent in the fund awarded to Dreyfus & Company in the limitation proceedings (R. 40, 41).

The case was submitted to the Special Commissioner on an agreed statement of facts which, with the exhibits an-

nexed thereto, appears at pages 41-61 of the printed record. The Special Commissioner in a report filed January 14, 1928 (R. 61-83), held, as contended by the petitioner, that the two insurance companies should share *pro rata* in the fund of $309,500, with interest, after payment of the expenses of litigating the claim of Dreyfus & Company in the limitation proceedings (R. 68).

Exceptions to the Special Commissioner's report (R. 84-86) having been filed, the District Court handed down its opinion on July 18, 1928, holding that the respondent is entitled to full reimbursement out of cargo's recovery, the petitioner to receive only the balance. The final decree (R. 88-91), in accordance with the District Court's opinion, provides that there be paid to the respondent out of cargo's recovery the sum of $284,000, with interest at the rate of 5 per cent. per annum from October 29, 1924; that the Commissioner's fee in the sum of $1,245 be then paid from the fund; and that the petitioner receive the balance of said fund (R. 90, 91).

If cargo's recovery is to be pro rated, the petitioner will receive approximately $55,000; but if the petitioner is to receive only the balance of the fund after the respondent has been reimbursed in full, the petitioner will receive only approximately $25,000.

IV.

Error Assigned by Petitioner.

The petitioner assigns error to the opinion and decree of the United States Circuit Court of Appeals for the Sixth Circuit in that said Court held

1. That the respondent should be paid $284,000, the full amount of its insurance, with interest, out of the fund of $309,500 recovered by the insured cargo against the *SS. Leonard B. Miller* in the limitation proceedings, and that the petitioner should receive only the balance of that fund remaining after such payment.

2. That the distribution of said fund should not be made *pro rata* between the petitioner and the respondent in proportion to the amounts of insurance paid by them respectively to Dreyfus & Company, the owner of said cargo.

The above assignments of error were argued in the Circuit Court of Appeals (R. 92, 93).

V.

Argument.

FIRST POINT.

The petitioner's insurance was insurance on cargo, and on actual value thereof. The Courts below erred in holding to the contrary.

In its opinion the District Court held:

> "Despite the language of the Standard policy, it was not in fact or law insurance upon the cargo, but upon the price at the point of delivery, for the loss of which there was no recovery by the owner of the cargo against the offending ship and, therefore, no subrogation.
>
> The indemnity provided by the Standard policy did not cover the character of loss for which recovery could be had by the owner against the Miller, and, therefore, the Standard Company is not entitled to pro-rate with the Scottish Company in the distribution of a fund representing actual value at the time and place of shipping. I think the Scottish Company entitled to full payment from the fund" (R., 87, 88).

In its opinion the Circuit Court of Appeals said:

> "We agree with the District Court that under the principles of subrogation as applied to the circumstances of this case the appellee is entitled to be paid from the fund in controversy the full amount which it paid to the insured and that after payment of said amount and of the Commissioner's fee already mentioned from such fund, the appellant is entitled only to the balance thereof" (R., 101).

The petitioner's insurance was insurance on cargo. The petitioner's policy (R. 20-29) bears the words "LAKE CARGO" on the upper left-hand corner of the first page.

The first paragraph of the policy reads:

> "Do make insurance and cause * * * to be insured *upon all kinds of Lawful Goods, Wares, Merchandise and Produce* laden on board the good vessel or vessels, etc." (R. 21);

and the second paragraph of the policy reads:

> "Beginning the adventure *upon the said property*, etc." (R. 21). (Italics ours.)

After quoting this language of the policy, the Special Commissioner had said:

> "This language would seem to indicate that the thing insured by the Standard Marine Insurance Company was also a cargo of grain" (R. 78).

The petitioner's policy provides for the coverage of two kinds of cargo: First, cargo which has *not* been insured by the shipper, and, second, cargo which *has* been insured by the shipper. Typewritten clause 4 of the policy (R. 27) provides the amount of the insurance coverage on shipments which have not been insured by the shipper, such shipments to be valued at an amount to be declared prior to sailing. That clause reads as follows:

> "To cover all shipments of grain owned by the assured, or in which the assured may have an interest and *not insured by the shipper*, such shipments to be valued, for the purposes of this insurance, at amount declared, such amount declared and advices of such shipments to be mailed to the company, 64 King Street, East, Toronto, Ontario, Canada, by registered letter prior to sailing of the vessel" (R. 27). (Italics ours.)

Typewritten clause 3 (the first rider on the policy, dated August 1, 1924 R. 25), provides for the amount of coverage on shipments which *have* been insured by the shipper (that is c. i. f. shipments). Clause 3 reads:

> "To cover 'INCREASED VALUE' on grain owned by the Assured or in which the Assured may have an interest, such 'INCREASED VALUE' for the purposes of this insurance, to be arrived at by taking the difference between the C. I. F. invoice cost and the highest market value per bushel, plus 5¢ (Five Cents) as set out in the New York Journal of Commerce, between the day of sailing of the vessel at point of shipment and the day of final delivery of the complete cargo at destination as named in the certificate, both dates inclusive; and in the event of casualty, to be valued at the difference between the C. I. F. invoice cost and the highest market value per bushel, plus 5¢ (Five Cents) as set out in the New York Journal of Commerce between the day of sailing of the vessel at point of shipment, and the day and the final delivery of the complete cargo would have arrived at destination if casualty had not occurred, both days inclusive. Advice of all such shipments to be mailed to the company, 64 King Street, East, Toronto, Ontario, Canada, by registered letter on day of sailing of the vessel, or as soon thereafter as practicable" (R. 25).

The use of the words "increased value" in clause 3 of the policy was necessary to properly describe the *amount* of the coverage where the shipper had, under its c. i. f. contract, taken out insurance to the extent of the c. i. f. price.

The differing provisions of clause 4 and clause 3 of the petitioner's policy do not change the *kind* of insurance; they simply provide for a different *amount* of the same kind of insurance, *i. e.*, insurance on cargo. The Commissioner pointed this out at pages 80, 81 of the record.

Dreyfus & Company, engaged in the business of purchasing grain under c. i. f. contracts, cannot compel the sellers and shippers of such grain to insure it for more than the c. i. f. price. *Tanvaco* v. *Lucas*, (1861) 30 L. J. (N. S.) 234; affirmed (1862) 31 L. J. (N. S.) 296. Moreover, Dreyfus & Company do not know with what company the sellers carry their insurance. The grain is not shipped until some time after the date of the c. i. f. contract. In the present case the grain was not shipped until two months after the contract. As, therefore, the *actual market value* of the grain, when it becomes the property of Dreyfus & Company on shipment some time after the date of the contract of sale, is in excess of the c. i. f. *price*, Dreyfus & Company carried the open policy with the petitioner for insurance on cargoes to the extent of this "increased value". As Dreyfus & Company could not call on the seller to insure for more than the c. i. f. price, Dreyfus & Company's insurance with the petitioner on "increased value" was the *only way* whereby Dreyfus & Company could keep those shipments of grain which were made to them under c. i. f. contracts, fully covered by insurance.

If Dreyfus & Company had been both shipper and consignee, Dreyfus & Company could, as the value of wheat increased, have arranged with their insurer to increase the valuation in its policy; the insurance would then have been in one company, and following the sinking of the cargo that insurance company would have been subrogated to the cargo's rights against the *SS. Leonard B. Miller*. The fact that, from the necessity of the case, Dreyfus & Company were obliged to take out insurance in another company to cover the cargo to the extent of the increase in value of the wheat cannot change the fact that both insurances were on cargo.

To make the matter clear, it is necessary to point out the various prices and/or values of the cargo per bushel, as follows:

Invoice *price*, c. i. f. Montreal, fixed by contract of August 25, 1924	$1.38½ per bu.
The *valuation* agreed on in the shipper's insurance under its open policy with the Scottish Metropolitan Co.	1.42 " "
The *actual market value* of the wheat *at the port of shipment* on October 27, 1924, the date of shipment, two months after the date of contract of sale	1.54¾ " "
The above *market value* at port of shipment was 16¼ cents above the contract *price*.	
The *market value*, as quoted in the New York Journal of Commerce on October 29, 1924	1.64¾ " "
Add $.05 to the above, as per clause 3 of petitioner's policy	1.69¾ " "
The amount of insurance on the cargo covered by the petitioner ($1.69¾ less $1.38½)	.31¼ " "

Both respondent's and petitioner's insurance were based on a price which contemplated delivery at Montreal. The respondent's insurance was based on a "c. i. f. Montreal" price of $1.38½ plus $.03½. It was not based on a spot price at port of shipment; it included the cost of transportation to Montreal. The petitioner's insurance was likewise based on a c. i. f. Montreal value, but at a subsequent date, "as quoted in the New York Journal of Commerce," plus $.05.

The additional 5 cents, which made up the valuation and limit of coverage in the petitioner's policy was obviously to

provide for a slight margin in case there was a slight error between the New York *quotation* and the *actual market value* of the cargo en route to Montreal. It should be noted that this 5 cents was 3 per cent. of the market value as quoted in the New York Journal of Commerce, and does not make the insurance speculative any more than the additional 3½ cents above the contract c. i. f. price (3½ cents is 2½ per cent. of the c. i. f. price) in the respondent's policy makes that policy speculative.

That the petitioner's insurance on Dreyfus & Company's cargo was insurance on actual value, is perfectly clear if we assume that Dreyfus & Company were going to use the cargo to fill a contract for export shipment from Montreal. Assuming that such was the case, then Dreyfus & Company, on the loss of the *Glenorchy* on October 29, 1924, would be obliged to replace the lost cargo, and in purchasing another cargo to replace the lost cargo, Dreyfus & Company would be obliged to pay the then market value of grain, which market value according to the quotation in the New York Journal of Commerce was $1.64¾ per bushel. There can be no doubt that that was the *minimum* actual market value of the grain on the date of the loss, and that at least that much would have had to be paid to replace the cargo which was lost. *The grain could not be replaced at c. i. f. contract price of August 25, 1924.*

The Courts below erred in reasoning that because the valuation in the petitioner's policy was a figure greater than the value at the point of shipment, whereas the award to Dreyfus & Company, as owner of the cargo, against the *SS. Leonard B. Miller* was limited by law to the market value at the point of shipment, the petitioner's insurance was not on the cargo but on the price at the point of delivery; and that, therefore, the petitioner did not have an equal right of subrogation with the respondent.

The limit of legal recovery in favor of the cargo owner against the *SS. Leonard B. Miller* has been fixed by decisions of this Court and the lower Federal Courts as the market value at the point of shipment on the day of shipment, plus the expenses of getting the cargo to the point of sinking. *The Vaughan and Telegraph* (1871), 14 Wall. 258, 267; *The Ocean Queen* (1867, C. C. S. D. N. Y.), 5 Blatch. 493; *The Aleppo* (1874, D. C. S. D. N. Y.), 7 Ben. 120, 129, 130; *The Oceanica* (1907, D. C. W. D. N. Y.), 156 Fed. 306, 307. There is, however, no connection between that rule of law, which limits the amount of recovery against a wrongdoing vessel, and the rights of subrogation to the fund representing that recovery.

Both lower Courts have treated the petitioner's insurance as though it were insurance, not on cargo, but on the cargo owner's ability to collect up to $1.69¾ per bushel from a wrongdoer.

As Dreyfus & Company, in order to replace the lost cargo would have to pay at least $1.64¾ per bushel, it seems clear that certainly up to that amount, even if not to the full $1.69¾ the petitioner's policy was insurance on *actual value* of the wheat. The fact that the value on delivery at Montreal would probably have been approximately the same as the value *en route,* does not make the petitioner's policy insurance upon the price on delivery any more than the respondent's policy, which was based on a "c. i. f. Montreal," *i. e.,* delivered at Montreal price.

The holding of the lower Courts in this case amounts to this:

Suppose goods worth $200,000, insured by the shipper under a c. i. f. contract for $150,000 in insurance company A, and insured by the purchaser for $50,000 on increased value in insurance company B, are totally destroyed in

transit and the carrier is liable, but because of the bill of lading valuation clause the recovery against the carrier is limited to $100,000. The lower Courts on their reasoning would hold that insurance company B had no subrogated rights to the fund recovered against the carrier, because the owner of the goods could not recover against the carrier more than $100,000. That proposition is clearly untenable.

It therefore seems clear that the petitioner's insurance on increased value was insurance *on the cargo*, and on the *actual value* of the cargo, which value was greater in October, 1924, than the c. i. f. contract price of August 25, 1924, two months earlier. The petitioner's insurance was not insurance on the price at the point of delivery, but was insurance on the value of the cargo day by day as a cargo *en route* to Montreal, on which the consignee would not have to pay any freight.

Both Courts below erred in their view of the legal effect of the "valuation" in the respondent's certificates. In its opinion the District Court said:

> "The Scottish Company issued its policy on the cargo of wheat for the full value of the wheat at an agreed full valuation of $284,000" (R. 86).

The fact that the respondent's certificates of insurance stated the valuation of the 200,000 bushels as $284,000 merely means that the respondent's *limit of liability* in case of total loss was $284,000; just as the valuation in the petitioner's policy means that the petitioner's *limit of liability* in case of total loss was the difference between the c. i. f. price and the highest market price, plus five cents, as quoted in the New York Journal of Commerce between the day of sailing and the day the cargo would have arrived at destination if casualty had not occurred. The

Courts below apparently felt that the valuation in the respondent's policy gave it a prior right of subrogation over the petitioner, but it is clear that in both policies the valuation merely fixes the maximum liability in case of total loss, a proposition which has been clearly and definitely settled by this Court.

In the decision of this Court in *Gulf Refining Co.* v. *Atlantic Mutual Insurance Co.* (1929), 279 U. S. 708, Mr. Justice STONE, in delivering the opinion of the Court, said at page 712:

> "The policy agreement valuing the cargo at a specified amount is not a representation, or so regarded. It is no more than a *stipulation*, in effect, that *for purposes of computation of the insurance liability* the cargo shall be taken at an agreed value." (Italics ours.)

The "valuation" in the respondent's certificates did not establish the value of the cargo; it merely fixed the limit of respondent's liability in case of loss.

The petitioner's insurance was insurance on cargo, and on actual value thereof.

SECOND POINT.

The petitioner's insurance was not insurance on profits.

In the Courts below, the respondent argued that the insurance provided for in Clause 3 of the petitioner's policy was not insurance on cargo, but was insurance "on profits", and cited *Canada Sugar Refining Co.* v. *Insurance Co. of North America*, (1900) 175 U. S. 609. In that case, how-

ever, the policy expressly described the insurance as "$15,000 *on profits* on cargo sugar; against total loss only; valued at the sum insured" (p. 613). In that case and the other cases involving insurance on profits—*The Patapsco Insurance Co.* v. *Coulter*, 3 Peters, 222, and *O'Brien* v. *North River Insurance Co.* (1914 C. C. A. 4 C.) 212 Fed. 102, the policy expressly described the insurance as being "on profits". Those decisions all point out that insurance "on profits", although legal, is *speculative insurance*, there being no burden on the assured in case of loss to show that there was in fact any market at the point of destination.

There was nothing speculative about the insurance provided for in Clause 3 of the petitioner's policy. The amount of insurance provided by that clause was based on *real value*, and actually fluctuated up and down according as the New York quotation of the market increased or decreased. No method of arriving at a valuation could more closely approximate *actual value* than the provision in Clause 3 of the petitioner's policy.

In its briefs in the Circuit Court of Appeals, and in opposing application for writ of *certiorari* in this Court, the respondent cited the English case of *Strass* v. *Spillers & Bakers, Ltd.*, L. R. (1911) 2 K. B. 759, and quoted from the opinion in that case certain language to the effect that policies on increased value are not the *ordinary kind* of cargo policies. The case, however, does not hold that policies on increased value are not cargo policies, but to the contrary, the facts stated in the opinion show that the policies on increased value on a cargo of grain were paid their proportion of loss as were the usual form of cargo policies, *the only question decided being who was entitled to the amounts paid under the increased value policies*. The facts were that by contract dated December 30, 1908, the defen-

dants bought from Dewar & Webb a cargo of wheat c. i. f. the contract providing "seller to give policies of insurance (free of war risk) for 2% over the invoice amount, and any amount over this to be for seller's account, in case of total loss only". On February 2, 1909, the plaintiff by contract in similar terms purchased from Messrs. Allatini a cargo of wheat of the same crop per the sailing ship *Leon Bureau* and received from Messrs. Allatini a policy on the cargo for £21,300 dated February 16, 1909. The market price of wheat having risen since February 2d, the plaintiff on February 9th effected a policy on increased value of the wheat for £2,000 with the London Assurance Corporation and a second increased value policy on February 27 for £2,000 with the British & Foreign Marine Insurance Co. These increased value policies were without benefit of salvage and were warranted free from average unless general, or the ship be stranded.

On March 16, 1909, the plaintiff re-sold the cargo to Messrs. Allatini at an increase in price and on the same day Dewar & Webb bought the cargo from Messrs. Allatini in order to fulfill their contract of December 30, 1908, with the defendants. In view of the increase in contract price, the plaintiff was obliged to hand to Messrs. Allatini on re-sale to them additional insurance to the extent of £1508. He therefore had the increased value policy of the British & Foreign Marine Insurance Company divided into two policies of £1508 and £492 and handed to Messrs. Allatini the policy for £1508, retaining the one for £492 as well as the increased value policy for £2000 effected with the London Assurance Corporation.

On the voyage the carrying vessel struck a rock and had to be beached, and in consequence the cargo sustained a particular average and a general average loss. Adjustment

was made and the losses were paid on the policies handed over to Dewar & Webb and by them handed over to the defendants, but these policies did not include the two retained by the plaintiff, namely, the increased value policies for £2000 and £492, respectively.

Subsequently, the plaintiff sent those two policies to Messrs. Allatini to be sent by them to the receivers of the cargo for presentation to the adjuster; and following this, the underwriters paid to the defendants under those policies £524 and £128, respectively; and the defendants refused to turn those amounts over to the plaintiff.

The Court pointed out that because of the particular terms of the two policies in question they were "not in the ordinary sense a mere insurance on cargo; and to pay in case of general average not *pari passu* with all other portions of the cargo and all *other policies on cargo*, but only in a particular way; it is warranted free from particular average; and finally it is without benefit of salvage" (p. 768).

The Court did not hold that the "increased value" policies were not insurance on cargo. All it held was that the two policies in question belong to the plaintiff and not to the defendants, and it should be noted that the "increased value" policy for £1508, which was not the subject of suit, but which had been handed to the defendants together with the *other policies on cargo*, received its share of loss payment with the *other cargo policies*. The two "increased value" policies which were the subject of the suit likewise were paid by the underwriters as cargo policies. *The only question decided by the case was the person entitled to the proceeds of those two particular "increased value" policies.*

The respondent also cited in the Court below the case of *Loders and Nucoline, Ltd.*, v. *The Bank of New Zealand*

(1929, Kings Bench Division) reported only in 33 Lloyd's List Law Reports 70. All that case held was that under a c. i. f. contract for the sale of copra, which called for insurance by the seller in the sum of £8587/10 the seller did not fulfill his obligation by tendering to the buyer policies on cargo to the extent of £7612/10 and additional policies for £975 on "freight payable at destination", merely by having the last mentioned policies worded:

> "on freight payable at destination, being increased value of copra through payment of freight or from such time as freight becomes due at destination, this insurance being deemed to be part of the total amount insured on the copra valued at such total amount."

The vessel was lost on the voyage, and as the freight was not due by the bills of lading until delivery at destination, the buyers were not able to collect from insurers on the £975 on "freight payable", and the sellers were therefore held liable to make good this deficiency of insurance. There is nothing in that case which bears on the present case.

The petitioner's insurance was not insurance on profits, but on cargo.

THIRD POINT.

Whether the respondent's insurance was prior insurance as compared with the petitioner's insurance is immaterial. Both petitioner and respondent paid a total loss, which was due, under their respective policies on the cargo, as is expressly stated in the agreed statement of facts.

In its opinion the Circuit Court of Appeals, after referring to the respondent's policy, states:

> "*Thereafter,* the insured obtained from the appellant (petitioner) insurer additional insurance upon this wheat" (R. 98) (Italics ours);

and,

> "The second insurer, the appellant (petitioner), promptly and *voluntarily* paid the insured insurance on the basis of the difference between the c. i. f. invoice cost, $1.38½ per bushel, and the highest market value, etc." (R. 99). (Italics ours.)

The respondent also argued in its brief in opposition to the petition for *certiorari,* that the petitioner's insurance was subsequent in time.

Both policies contain the familiar American Clause. That clause in the petitioner's policy reads:

> "Provided always, and it is hereby further agreed, that if the said insured shall have made any other insurance upon the property aforesaid, prior in date to this policy, then this Company shall be answerable only for so much as the amount of such prior insurance may be deficient towards fully covering the property hereby insured; and this Company shall return the premium upon so much of the sum

by them insured as they shall be by such prior insurance exonerated from. And in case of any insurance upon the said Property, subsequent in date to this Policy, this Company shall nevertheless be answerable for the full extent of the sum by them subscribed hereto, without right to claim contribution from such subsequent insurers, and shall accordingly be entitled to retain the premium by them received, in the same manner as if no subsequent insurance had been made" (R. 22).

The clause in the respondent's policy reads:

"Provided Always, and it is hereby further agreed, that if the said Insured shall have made any other insurance upon the goods aforesaid, prior in day of date to this Policy, then the said Assurers shall be answerable only for so much as the amount of such prior insurance may be deficient towards fully covering the goods hereby insured; and the said Assurers shall return the premium upon so much of the sum by them insured, as they shall be by such prior insurance exonerated from. And in case of any insurance upon the said goods subsequent in date to this Policy, the said Assurers shall nevertheless be answerable for the full extent of the sum by them insured without right to claim contribution from such subsequent insurers, and shall accordingly be entitled to retain the premium by them received, in the same manner as if no such subsequent insurance had been made. Other insurance upon the goods aforesaid, of date the same day as this Policy, shall be deemed simultaneous herewith; and the said Assurers shall not be liable for more than a ratable contribution in the proportion of the sum by them insured to the aggregate of such simultaneous insurance."

The respondent's open policy, issued originally to Alberta Co-Operative Wheat Producers, Ltd. (R. 46-56) is

dated February 22, 1924 (R. 51), and was assigned to Canadian Co-Operative Wheat Producers, Ltd. September 10, 1924 (R. 43). The petitioner's open policy issued to Dreyfus & Co. (R. 20-29) is dated July 12, 1924 (R. 29).

The respondent's certificates covering the 200,000 bushels of wheat (Exhibits D and E, R. 56-59) are dated October 28, 1924. In view of the shortness of time between shipment of the cargo and its loss, no insurance certificate was issued by the petitioner.

The respondent's open policy is "for account of whom it may concern" (R. 53), and defines the risk on shipments as "beginning the adventure upon the said goods *from and immediately following the loading thereof on said vessel* * * *" (R. 47), and the respondent's certificates issued under that policy specifically describe the cargo covered as "shipped on board of the Steamer *Glenorchy at and from* Fort William and/or Port Arthur to Montreal via Port Colborne" (R. 57 and 58).

The petitioner's open policy defines the risk on shipments as "beginning the adventure upon the said property *from and immediately following the loading thereof* at the port or place named in the endorsement" (R. 21).

It is thus clear from the express terms of both policies that both insurances attached at the same moment, namely, the completion of the loading of the cargo on the *SS. Glenorchy.* Even if, for the sake of argument, it should be held that the respondent's insurance was prior insurance, that did not relieve the petitioner from the legal duty of paying a total loss under its policy, because payment of both insurances was necessary in order to "fully cover the property hereby insured".

The complete insurer to the respondent's argument about prior insurance is, that *typewritten* clause 3 in the petitioner's policy (R. 25) expressly deals with c. i. f. ship-

ments, *i. e.*, shipments where the shipper *must* provide insurance up to the c. i. f. price; and clause 3 expressly defines the amount of insurance covered by the petitioner in such cases, viz., "the difference between the c. i. f. invoice cost and the highest market value per bushel, plus 5¢ (five cents) as set out in the 'New York Journal of Commerce', etc."

The situation is one where two insurers of the same cargo have paid the owner of the cargo for a total loss under their respective policies. The petitioner was legally obligated to pay the assured, and did not, as the Circuit Court of Appeals suggested, pay as a volunteer. It is expressly stipulated in the agreed statement of facts that the respondent paid $284,000 which was in fact due from it to Dreyfus & Co. (R. 43); and likewise the petitioner paid $62,500 which was in fact due from it to Dreyfus & Co. (R. 44).

The case before the lower Courts, as now before this Court, is one where both insurers were obliged to pay, and did pay, to the assured, the owner of the cargo, a total loss under their respective policies.

In *Brown, et al.* v. *Merchants' Marine Insurance Co., Ltd., et al.* (1907 C. C. A. 9 C.) 152 Fed. 411, the Court, quoting Arnold on Marine Insurance, said at page 413:

> "Upon abandonment each of the underwriters participates in the benefits of the transfer by sharing in the proceeds of the salvage according to the proportion which the amount of his subscription bears to the whole value of the thing insured, *and this without regard to the date of the different subscriptions, or the priority of the policies, if more than one.*" (Italics ours.)

FOURTH POINT.

Where underwriters have paid the insured a total loss under their policies, the underwriters on "increased value" share pro rata with other underwriters in the fund recovered from the wrongdoer.

We have already pointed out at page 13 that if Dreyfus & Company had been both shipper and consignee, they could, as the value of wheat increased, have arranged with their insurer to increase the amount of its policy; the insurance would then have been in one company, and following the sinking of the cargo, that insurance company would have been subrogated to the cargo's rights against the *SS. Leonard B. Miller.* The fact that, from the necessity of the case, Dreyfus & Company were obliged to take out insurance in another company *to cover the actual increase in market value of the wheat* on its becoming their property, cannot change the fundamental principle of subrogation, viz.: in the case of a single insurer, it steps into the shoes of the assured vis-a-vis the wrongdoer; if more than one insurer covers the property they *jointly* step into the shoes of the assured vis-a-vis the wrongdoer. In the supposed instance, the single insurance company would have had the entire rights of subrogation against the *SS. Leonard B. Miller;* in the actual facts of this case, the two insurance companies are jointly subrogated to those rights, and jointly share in the fund recovered from the wrongdoer.

Assignment of the assured's rights against the wrongdoer who has caused the loss follows automatically on payment of the loss by insurer or insurers without the necessity of a formal document of assignment. *Federal Insurance Co. et al.* v. *Detroit Fire & Marine Insurance Co. et al.*

(1913 C. C. A. 6 C.) 202 Fed. 648, at page 651, *certiorari* denied 229 U. S. 620. In the present case, however, the policies of both petitioner and respondent contained an express subrogation clause in the following language:

> "It is also understood and agreed, that in case of loss or damage under this policy, the assured, in accepting payment therefor, thereby and by that act assigns and transfers to this company *all his or their right for loss or damage, as against the carrier or other person or persons*, to inure to their benefit, however, to the extent only of the amount of the loss or damage and attendant expenses of recovery paid or incurred by this Company" (R. 23 and 49). (Italics ours.)

The principle that where several insurers pay a loss on the same property they are jointly subrogated to the rights of the assured against the wrongdoer who has caused the loss, and jointly share in the fund recovered from the wrongdoer, is true not only as a matter of principle, but also of precedent. The decision in the present case is in direct conflict with the decision of the Circuit Court of Appeals for the Ninth Circuit in *Brown et al.* v. *Merchants Marine Insurance Co., Ltd., et al.* (1907 C. C. A. 9 C), 152 Fed. 411, where that Court held that where underwriters have paid the insured a total loss under their policies, the underwriters on "increased value" share *pro rata* with other underwriters in the fund recovered from the wrongdoer.

No case has been found *contra*.

In that case, the *SS. City of Kingston* was insured by various insurance companies against all risks under separate policies, in each of which the vessel was valued at $75,000. Two other insurance companies issued to the owners of the *SS. City of Kingston* two policies aggregating

$12,200 "on disbursements and/or increased value," the insurance being against total loss only and warranted free from all average and salvage charges, and containing a policy proof of interest clause. In addition to all of the above policies the St. Paul Fire & Marine Insurance Company insured the vessel in the sum of $4,800 against total loss only, no valuation being inserted in that policy.

During the pendency of all of the above policies, the *SS. City of Kingston* was in collision with the *SS. Glenogle*, and was sunk. All of the underwriters on hull, together with the St. Paul Fire & Marine Insurance Company, paid a total loss and at the request of these underwriters the owner of the *SS. City of Kingston* brought suit to recover damages from the owners of the *SS. Glenogle*. On the trial, the Court found the actual value of the *SS. City of Kingston* was $140,000, that both vessels were in fault, and decreed division of damages. The result was that $67,472.96 was paid into court for the owners of the *SS. City of Kingston*. After payment of costs of the suit, the net amount left in the registry of the court was $47,426.97, for distribution among the insurance companies who were entitled to receive the same.

At this point, the two insurers "on disbursements and/or increased value" intervened, alleging that they had paid a total loss and were entitled to share *pro rata* with all the other underwriters in the fund in court. The District Court sustained this position and made *pro rata* distribution of the funds to all the underwriters.

On appeal the decision was affirmed, the Circuit Court of Appeals expressly overruling the contention of the hull underwriters that because they had insured the *SS. City of Kingston* in the sum of $75,000 *in policies which valued her at that sum*, they were entitled to be subrogated to

that amount in the award to the owner of the *SS. City of Kingston* and the contention that the insurers on "disbursements and/or increased value" were not entitled to share in the fund.

At page 413, the Circuit Court of Appeals said:

> "The assured in the policies issued by the appellees was in fact the owner of the property insured, and could undoubtedly have recovered on the policies. Such being the case, we are unable to discover any recognized principle of law or equity on which it should be held that the appellees are not entitled to rank equally with the other underwriters in the distribution of the fund in court. No ground for discrimination against the appellees can be found in the fact that the policies which they issued covered 'disbursements.' The object of insurance on disbursements is to insure the shipowner the recovery of additional sums beyond the amount covered by his insurance on ship and freight, and it is made against total loss only. Arnould, Marine Ins., Sec. 247. In International Navigation Company v. Atlantic Mutual Insurance Co. (D. C.), 100 Fed. 304, Judge Brown said that policies on disbursements are in very common use, and are 'designed to cover a variety of interests not covered by policies in the ordinary form, including moneys which have gone into the construction of the hull and equipment and sunk in depreciation * * * 'Disbursement' policies are often issued where the hull is fully covered by other policies.' *And, since the appellees could, as we have seen, have been compelled to pay the loss under their policies, they are not, as suggested by the appellant, mere volunteers in paying the same and therefore to be denied the right of subrogation.* Nor do we see that their delay in paying or their refusal to participate in the proceeding to recover damages from the owners of the *Glenogle* should be

held to be ground for excluding them from participation in the fund. *Subrogation results by operation of law from the mere act of the payment of the loss,* and does not depend on the voluntary act of the assured. Phoenix Ins. Co. v. Erie Transportation Co., 117 U. S. 312, 6 Sup. Ct. 750, 29 L. Ed. 873; St. Louis, etc. Railway v. Commercial Ins. Co., 139 U. S. 223, 235, 11 Sup. Ct. 554, 35 L. Ed. 154. In the *Livingstone,* 130 Fed. 746, 65 C. C. A. 610, the amount in controversy was recovered by the unaided effort of the owners, and against the active opposition of the intervening underwriters. It was held, notwithstanding this fact, that the interveners were entitled to subrogation. We find the general doctrine applicable to this case in Arnould, Marine Ins. Sec. 1215, where it is said:

> 'Upon abandonment each of the underwriters participates in the benefits of the transfer by sharing in the proceeds of the salvage according to the proportion which the amount of his subscription bears to the whole value of the thing insured, *and this without regard to the date of the different subscriptions, or the priority of the policies, if more than one.*'

We find no error in the decree of the District Court. It is accordingly affirmed." (Italics ours.)

The award to the insurers on "disbursements and/or increased value" was $4,132.92 (p. 412). The calculation of that award, although not worked out in the opinion, is necessarily as follows:

Valued hull policies	$ 75,000.00
Disbursements and/or increased value insurance	12,200.00
Unvalued hull policies	4,800.00
Owner, co-insurer for	48,000.00
The total interests in the vessel	$140,000.00

There was $47,426.97 for distribution.

The disbursements and increased value insurance received

$$\frac{12,200}{140,000} \times \$47,426.97 = \$4,132.90$$

If in the present case of *The Glenorchy,* the same law and the same method of calculation had been applied, the result would be:

Valued policy of Scottish Company	$284,000.00
"Increased value" policy of Standard Company	62,500.00
Total interests in the 200,000 bushels of wheat	$346,500.00

There is $309,500 for distribution.

The "increased value" insurance should receive

$$\frac{62,500}{346,500} \times \$309,500 = \$55,826.10$$

exclusive of interest.

Under the decree of the Circuit Court of Appeals as it now stands, the petitioner will receive only about $25,000.

Brown v. *Merchants Marine Ins. Co., Ltd.,* was cited with approval in *Federal Insurance Co. et al.* v. *Detroit Fire & Marine Insurance Co. et al.* (1913, C. C. A., 6 C), 202 Fed. 648, *certiorari* denied 229 U. S. 620.

In *Federal Insurance Co. et al.* v. *Detroit Fire & Marine Insurance Co. et al.,* the *SS. Etruria* was in collision with the *SS. Amasa Stone* and as a result of suit, it had been held both vessels were to blame and damages were divided. The collision resulted in the total loss of the *Etruria* and her cargo. At the time of her loss, the *Etruria,* was insured in

sixteen companies, holding risks in varying sums amounting to an agreed valuation, and the shipowner was paid such value by the insurers. The cargo and pending freight was separately insured by two of these underwriters, and these losses were likewise paid. Thereupon eight of these insurers (including the insurers of cargo and freight) requested, and eight of them declined to request, the owner of the *Etruria* to bring the suit which resulted in settling the question of liability.

After the decree on mandate was entered in the District Court those eight insurers who had not requested the bringing of the suit filed intervening petitions in the District Court demanding that they receive out of the recovery in favor of the owners of the *Etruria,* their *pro rata* amount. The District Court thereupon ordered the fund to be distributed so that the claims of the insurers who had joined in the request to bring the suit should be paid in full and after payment of such sums the remainder of the fund to be paid to the non-requesting underwriters *pro rata.* Under this decree the non-requesting underwriters would have received only a small percentage of the amounts they had paid to the owners of the *Etruria.* The non-requesting underwriters appealed.

The Circuit Court of Appeals held that the execution of a subrogation receipt was not necessary in order to give an underwriter subrogation rights, saying at page 651:

> "Most of the insurers obtained subrogation receipts from the owner upon paying their shares of its loss, some of which in terms provided for full subrogation and others 'to the extent only and as provided for' in the policies, although the policies do not appear to have contained any provision for subrogation. However, we do not regard this as important, nor do counsel for either side because it is settled that such

provisions are not necessary. The right of subrogation arises from the very nature of the contract of insurance as a contract of indemnity. *Phoenix Insurance Co.* v. *Erie Transportation Co.*, 117 U. S. 312, 321; *Liverpool Steam Co.* v. *Phoenix Ins. Co.*, 129 U. S. 462; *North England Ins. Assn.* v. *Armstrong*, L. R. 5 Q. B. 244; *Comegys* v. *Vasse*, 1 Peter 193, 212."

And again at page 652:

"Admittedly, the subrogation rights of all the insurers of the *Etruria* were, when acquired, entitled to equal protection; but it is urged that the non-consenting insurers destroyed this equality by waiver."

The Court held that the refusal to request the bringing of the suit was not a waiver of the non-consenting underwriters' subrogated rights, saying at page 654:

"The owner sought to recover and did recover (to the extent allowed) the proportionate shares alike of all the insurers. True, it did so in its name as owner, but at last in virtue of its Trusteeship respecting such shares."

In holding that all the insurance companies who had paid should share *pro rata* in the fund, the Court held in conclusion at page 657:

"That the claims of all the insurers of the *hull* (of the *Etruria*) appellees and appellants alike, must be placed on an equality; and the claims for *freight* and crew will be placed on a parity with them."

The Commissioner correctly held in his Fifth conclusion of law (R. 68) that the petitioner is entitled to share *pro rata* with the respondent in the $309,500 awarded to Dreyfus & Co. as owner of the 200,000 bushels of grain. The Courts below erred in reversing this holding.

Conclusion.

The petitioner paid a total loss under its policy, namely, $62,500. The respondent likewise paid a total loss under its policy, namely, $284,000. The total payments by the two insurance companies were $346,500. Cargo's recovery in the collision litigation, as respects the 200,000 bushels of wheat, was $309,500.

Both insurances were insurance on cargo.

Both open policies contained a clause in identical language providing that on accepting payment of loss thereunder, the assured thereby assigned to the insurer all the assured's right to claim for loss or damage against any other person.

The two insurance companies by virtue of their payments of a total loss under their respective policies were *jointly* subrogated to cargo's rights against the *SS. Leonard B. Miller,* and to the fund recovered by cargo against that vessel.

There are no degrees in subrogation.

The two insurance companies have by mutual agreement taken care of the expenses of creating the fund of $309,500, so that this Court can disregard any deduction for the expenses of that litigation.

It is clear on principle and authority that the two insurance companies should share *pro rata* in the fund of $309,500. The award to the petitioner should be 62,500/346,500ths of $309,500, with accrued interest. The award to the respondent should be 284,000/346,500ths of $309,500, with accrued interest.

By the decree of the District Court, the Commissioner's fee of $1,245 was taken out of that part of the fund awarded to the petitioner (R. 90). As the refusal of the

respondent to recognize the petitioner's rights to *pro rata* distribution of the fund made necessary the litigation over the distribution of that fund, the Commissioner's fee should be deducted from the respondent's recovery.

The decree of the Circuit Court of Appeals should be reversed, with instructions to pro rate between the petitioner and the respondent the $309,500 with interest.

Respectfully submitted,

RUSSELL T. MOUNT,
Counsel for Petitioner.

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IN THE

Supreme Court of the United States

OCTOBER TERM 1930.

No. 261.

STANDARD MARINE INSURANCE COMPANY, LTD.,

Petitioner,

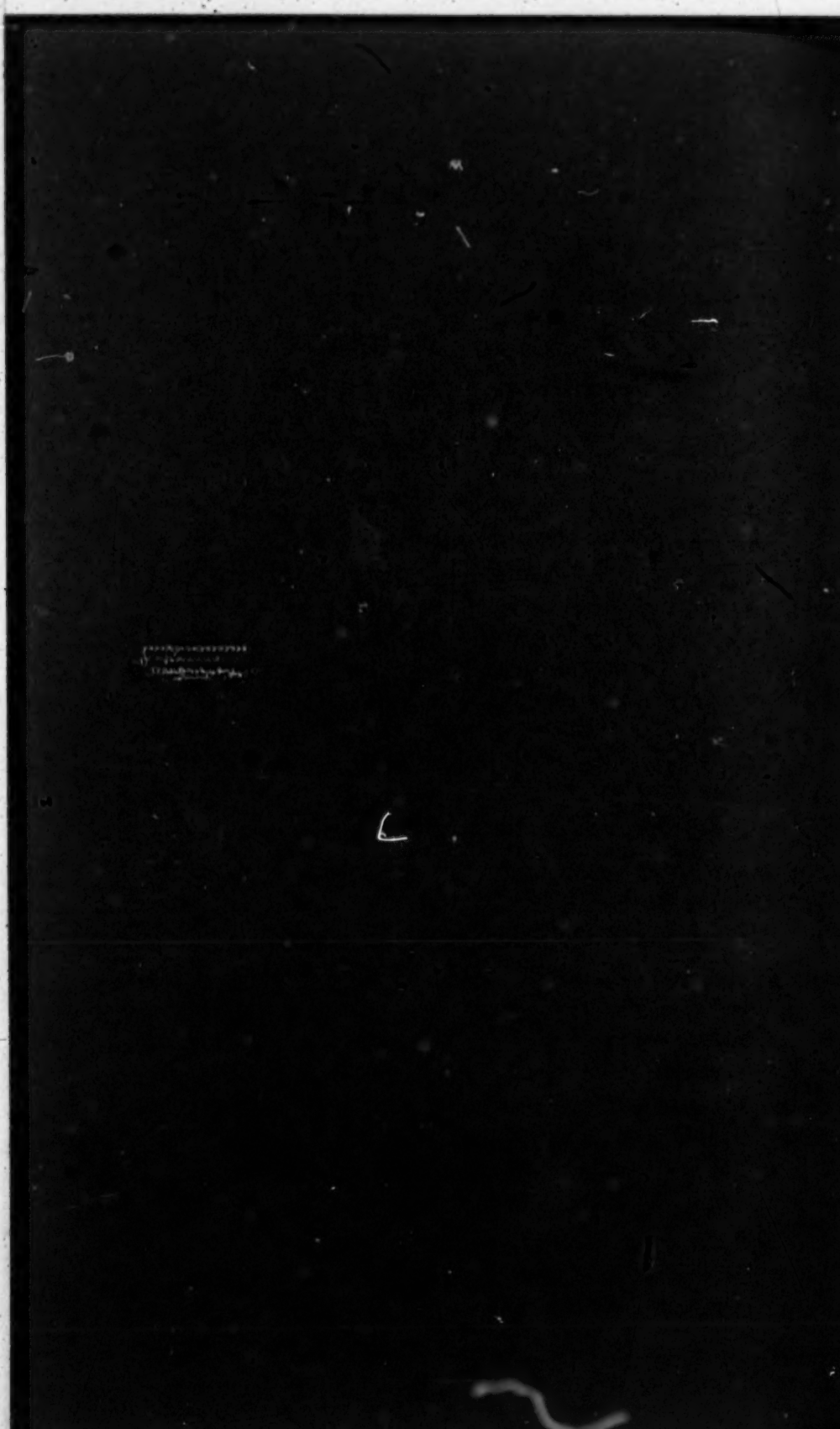
—against—

SCOTTISH METROPOLITAN ASSURANCE COMPANY, LTD.,

Respondent.

BRIEF ON BEHALF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

T. CATESBY JONES,
JAMES W. RYAN,
Counsel for Respondent.



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STANDARD MARINE INSURANCE COMPANY, LTD.,
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Respondent.

BRIEF ON BEHALF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

THE OPINIONS OF THE COURTS BELOW.

The opinion of the District Court is reported in 28 Fed. (2nd) 540, and that of the Circuit Court of Appeals affirming it in 39 Fed. (2nd) 436.

Statement of the Case.

The statement of the case appearing in the petition and supporting brief does not give to the Court a clear conception of the decree of the trial Court (R., 92) which was affirmed by the Circuit Court of Appeals (R., 111), and which it is now sought to review (R., 92). The trial Court in its opinion (R., 89) clearly understood the situation and dealt with it in accordance with the well-settled principles of subrogation. The Circuit Court of Appeals in its opinion (R., 108) also clearly understood the situation and affirmed the decree below. Both decrees turned on questions of fact which are determined by the agreed facts (R., 45) and not by the fourteen "findings of fact" mistakenly made by the Commissioner

(R., 65). It is from these fourteen "findings" (R., 65 to 70) that counsel for petitioner has extracted the remarkable statements and figures which appear on page 6 of the petition and which form the foundation for all his subsequent argument and for his contention that the case is similar to the *Brown* case in the Ninth Circuit and therefore that there is a conflict in decisions.

Counsel for petitioner admits that he is asking this Court to reinstate a "holding of the Special Commissioner which both lower Courts have reversed" (Petition, p. 2). That Commissioner's holding is at page 65 of the record and shows on its face that it was based on fourteen "Findings of Fact" (R., 65-70) which neither Court below has found or accepted and which were made by the Commissioner through confusion and error because no evidence at all was introduced before him or the Court to establish them.

At page 2 of the petition counsel for petitioner says:

> "The special commissioner held that the two insurance companies, under their subrogated rights, were entitled to share *pro rata* in the $309,500 cargo's recovery against the 'Leonard B. Miller' (Paragraph 5, p. 71). It was this holding of the special commissioner which both lower Courts have reversed."

The confused understanding which the Special Commissioner had of the situation and of the facts is so evident that counsel for petitioner who is now trying to reinstate the Commissioner's holding, has found it necessary to attempt an original reformulation of "facts". The extent to which petitioner in doing this has had to resort to the Commissioner's "findings" would be still more evident if he had followed the usual practice of making citations of the record to support the various statements of fact. Inasmuch as the settled rule of this Court is

that it will not disturb the concurrent findings of fact of both lower Courts, and inasmuch as the questions argued by petitioner do not arise excepting to the extent and on the limited facts found and accepted by the two lower Courts, it would seem unnecessary to make further reply to the petition for certiorari. No authority is cited by counsel to support his contention that this Court will in effect hold another commissioner's hearing on questions of fact in the face of concurrent findings of fact and conclusions of law by both Courts below.

An illustration of the type of inaccuracy of fact which repeatedly occurs in petitioner's statement of the case is on page 6 of the petition, where the first two lines refer to a "highest market value" of $1.69¾ on October 27th, citing in support of that statement page 69 of the record, which an examination of the record shows is the tenth of the baseless fourteen "findings of fact" made by the Commissioner. Still more unwarranted is petitioner's failure to call the Court's attention to the fact that that value was not at the port of shipment (which value is the only one recovered in the collision suit, and represented by the fund being distributed), but at Montreal, as is conclusively shown on page 63 of the record in the agreed statement of facts signed by counsel for petitioner himself. It is there agreed that "our (the petitioner's) assured's open policy will be figured on the basis of the highest C. I. F. Montreal quotation during the ten days from October 27th" (R., 63). The exact opposite of what counsel for petitioner states as "facts" at the bottom of page 5 and at the top of page 6 is thus shown by petitioner's own document and agreed statement of facts. The Courts below concurred in limiting their decisions to the agreed statement of facts (R., 45) and declined to go outside

the record and discuss the other additional "facts" which the Commissioner had mistakenly assumed and "found".

The inaccuracies in the petitioner's statement of the case are so numerous and so scattered that a detailed correction of them would unduly extend this brief.

In order, therefore, that the true situation may be before the Court, we shall state rather fully and in orderly fashion the facts upon which the two Courts below based their opinions (R., 89, 108) and particularly upon which the trial Court based its decree, distributing the fund (R., 92). These facts are all contained in the agreed statement of facts which will be found at pages 45 *et seq.* of the record, and the exhibits annexed thereto. We take it it will be unnecessary to discuss the obvious proposition that the Courts below were justified in ignoring the findings of fact which the Commissioner confusedly made and which form the basis for the petition for certiorari. When parties formally agree as to all the facts it is unnecessary and improper for a commissioner to make findings.

Facts.

On October 26, 1924, at Fort William and Port Arthur, the Canadian Cooperative Wheat Producers, Limited, shipped 200,000 bushels of wheat on the steamship "Glenorchy", for carriage to Port Colborne for transshipment to Montreal (R., 46). On October 26, 1924, the Canadian Cooperative Wheat Producers, Limited, issued a certificate of insurance on the shipment for $284,000, on a valuation of $284,000, based on a value of $1.42 per bushel (R., 47, Exhibits "D" and "E"; R., 59-61). The certificate was issued under an open policy No. L-100023 of respondent in the usual cargo

form covering all shipments by the Canadian Cooperative Wheat Producers, Limited, during a specific period.

The policy of insurance provided:

"Valued, premium included, at amount of invoice including all charges in the invoice and including prepaid or advanced or guaranteed freight, if any, plus Ten Percent unless otherwise agreed upon prior to shipment" (R., 57).

"To cover 100% interest in all shipments of grain and/or flaxseed and/or cereals and/or maize, their own, or in which they may have an insurable interest, or the property of others, which they may receive instructions to insure, such instructions being mailed or given the Canadian Cooperative Wheat Producers, Limited, in writing, prior to shipment and before any known or reported loss or accident" (R., 55).

"It is also understood and agreed that in case of loss or damage under this policy the assured in accepting payment therefor thereby by that act assigns and transfers to these assurers all his right or their right to claim for loss or damage, as against the carrier or any person or persons, corporation or corporations, to inure to their benefit, however, to the extent only of the amount of the loss or damage and attendant expenses of recovery paid or incurred by the said assurers and any act of the insured, waiving or transferring or tending to defeat or decrease any such claim against such carrier or any person or persons, corporation or corporations whether before or after the insurance was made under this policy shall be a cancellation of the liability of these assurers, for or on account of the risk insured for which loss is claimed" (R., 52, 53).

A negotiable bill of lading was issued to the Canadian Cooperative Wheat Producers, Limited, and it sold it to Louis Dreyfus & Company and delivered to that firm, as the buyer, an invoice for 200,000 bushels of Manitoba No. 2 wheat, at a purchase price of $1.38½ per bushel (R., 46, Exhibits "A" and "B"; R., 48, 49).

The certificates of insurance, aggregating $284,000, were turned over with the bill of lading to Louis Dreyfus & Company. Louis Dreyfus & Company had a policy of insurance with the petitioner, Standard Marine Insurance Company, but this policy of insurance contained provisions which precluded the policy from attaching wherever the shipper or Louis Dreyfus & Company had obtained other insurance. See Clause 4 of the Schedule attached to the Standard Marine Insurance Company policy, which reads as follows:

> "To cover all shipments of grain owned by the assured, or in which the assured may have an interest AND NOT INSURED BY THE SHIPPER" (R., 30).

There is no question that the policy of the Scottish Metropolitan Assurance Company, Ltd., the respondent, had attached prior in date to that of the Standard Marine Insurance Company, Ltd., the petitioner, because the Standard Marine Insurance Company's could not attach until the grain had been transferred from the Canadian Cooperative Wheat Producers, Limited, to Dreyfus & Company. This transfer took place after the negotiable bill of lading was issued to the Canadian Cooperative Wheat Producers, Limited, and sold by it to Louis Dreyfus & Co. The cover of the Standard Company was, therefore, limited to the cover contained in Clause 3 of the Schedule appearing on page 30, which is as follows:

"3. To cover 'INCREASED VALUE', on grain owned by the Assured or in which the Assured may have an interest, such 'INCREASED VALUE', for the purposes of this insurance, to be arrived at by taking the difference between the C. I. F. invoice cost and the market value per bushel as set out in the 'New York Journal of Commerce' on the date of sailing of the vessel, plus 5c. (Five Cents) per bushel added thereto: Advices of all such shipments to be mailed to the Company, 64 King Street, East, Toronto, Ontario, Canada, by registered letter on date of sailing of the vessel, or as soon thereafter as practicable."

The "Glenorchy" with the shipment on board sailed from Fort William on October 27th, and on October 29, 1924, was sunk in collision with the steamship "Leonard B. Miller" and became, with her cargo, a total loss (R., 46).

Dreyfus & Company presented a claim on the certificate issued on the cargo policy, and on November 3, 1924, the Scottish Company paid to Dreyfus & Company $284,000, which sum was in fact due from the Scottish Company to Dreyfus & Company in respect of the certificates of insurance mentioned above, "covering the grain which had been insured under open policy No. L-100023 of the Scottish Metropolitan Assurance Co., Ltd., issued to the Canadian Cooperative Wheat Producers, Ltd., which certificates had in due course been endorsed to Louis Dreyfus & Co." (R., 47), this being the full amount at which the grain had been valued in the policy.

On October 30, 1924, the day after the collision, Dreyfus & Company, through their brokers, R. F. Murray & Bro., Inc., made a declaration to the Standard Marine Insurance Company, Ltd., under open policy No. 1010, by letter dated October 30, 1924, supplemented by detailed

statement dated October 31, 1924 (R., 47). In the declaration under the policy, the risk which was submitted to the Standard Company was described as follows:

> "As this steamer sailed on the 27th of October with shipment of grain for Montreal, we are figuring the number of days for this voyage to be ten days, and insured value under our Assured's Open Policy will be figured on the basis of the *highest C. I. F. Montreal quotation* during the ten days from October 27, to which, of course, is added 5c. as provided for in the policy" (R., 63). (Italics ours.)

Exhibit "G" shows the Montreal value as $1.64¾ to which was added the sum of 5 cents, bringing the Montreal value, plus 5 cents, up to $1.69¾ per bushel. That this is the Montreal value is clear from Exhibit "F", from which we have quoted, and the stipulations of facts, which provide that the declaration Exhibit "F" is the declaration under the policy, and that Exhibit "G" is a mere supplement to Exhibit "F". The District Court was therefore quite correct, and followed this statement of facts precisely, when it held that the sum insured by the Standard Company was the sum based on the difference between the C. I. F. price at the port of loading and the C. I. F. price at Montreal, the port of contemplated discharge. In accordance with the debit note, Exhibit "G", and the declaration, Exhibit "F", the Standard Company on November 28th paid to Dreyfus & Company the sum of $62,500, as increased value as figured in Exhibit "G" pursuant to the declaration, Exhibit "F".

In the suit of Dreyfus & Company, as owners of the cargo, against the steamship "Leonard B. Miller", for the loss of the cargo arising out of the collision between the "Leonard B. Miller" and the "Glenorchy", the cargo

owners recovered a total sum of $309,500. This recovery was based upon a stipulation that the actual market value of the cargo on date of shipment was $1.54¾ per bushel, the value at port of shipment, Port Arthur. See affidavit of James T. Irving, Record, 11, 12, at page 12, where Mr. Irving says:

> "2. That on the 27th day of October, A. D., 1924, the official records of the Winnipeg Grain Exchange for wheat for October delivery, basis in store Fort William or Port Arthur were as summarized hereunder:
>
> | | |
> |---|---|
> | Opening price range: | $1.54 at $1.54½ per bushel |
> | High price | $1.54¼ per bushel |
> | Low price | $1.53½ per bushel |
> | Closing price | $1.54¾ per bushel |
>
> 3. That these are prices for wheat basis in store Fort William or Port Arthur."

The recovery, therefore, was $37,500 less than the total sum paid to Dreyfus & Company for cargo loss and by the Standard Company for increased value.

The Standard Company filed a petition in this proceeding, which it later amended, in which it alleged the provision of the policy of the Standard Company relating to the cover of increased value as the portion of the standard contract which related to the fund in controversy (R., 18), and demanded more than $56,000 as its share of the recovery. The Scottish Company answered this petition and alleged that its insurance was a full cover as against the grain and that the insurance issued by the Standard Company was insurance on increased value (pp. 34, 35), and for that reason that the Scottish Company was entitled to full reimbursement in respect of the sum which it had paid, before anything should be paid to the Standard Company. The Court referred this

feature of the case to a Commissioner, who filed a report stating that the Standard Company by the mere fact of payment under its increased value policy, was entitled to share pro rata with the Scottish Company. Exceptions were filed by the Standard Company to this report. The first exception was, as we have previously stated, directed to the obvious error of the Commissioner in assuming that he must find the facts, the facts already having been agreed to by the parties. The other exceptions may be summarized as follows:

1. The Commissioner erred in assuming that the collision recovery (which was the only fund in controversy) represented the price in Montreal at the time the wheat was expected to arrive there. This price or value at destination, Montreal, which was insured by the Standard Company was the excess or increase over the value at time and place of shipment (Fort William), which was insured by the Scottish Company. The collision recovery had been agreed by the parties, and found by the Court, to be the value at the time and place of shipment, this being the exact interest insured by the Scottish Company. No part of the fund in court represented the Montreal price; or any increased value insured against by the Standard Company. There was a small difference between $309,500, the value of the 200,000 bushels at time and place of shipment and the $284,000 paid by the Scottish Company. The Scottish Company of course was not interested in this excess, which would seem to belong properly to the Dreyfus Company itself and not to either of the insurance companies. The Dreyfus Company, however, never filed a claim to it, and as the Standard Company was the only one asserting any right to it, the Court awarded this small excess or difference to the Standard Company. The Court of course reversed the

remainder of the Commissioner's conclusions on the ground that they were based on the mistaken assumption that the value at Montreal instead of at Fort William was recovered in the collision suit.

2. The Commissioner erred in applying the English instead of the American rule with reference to double insurance. Under the American rule, which was incorporated by special provision in both these policies, it was impossible to have double or duplicate insurance. Under the American rule, the Standard Company's policy being subsequently issued, did not attach where any insurance was already effected on the wheat by the Scottish Company.

3. The Commissioner erred in assuming that the case was one of double insurance instead of insurance on distinct risks and interests. The distinction was evident from the fact that the values insured were based on different times and places.

4. The Commissioner erred in concluding that the result was equitable on the mistaken premise that the underwriters could recover back from the assured pro rata $37,000, this being the excess over and above the two sums which were paid by the Standard Company and the Scottish Company to Dreyfus.

5. The Commissioner erred in failing to hold that the Standard Company's policy was on a non-existent and unreal value, because the wheat never arrived at Montreal, the place at which the value was determined. That insurance was on a value which the wheat would have had if it had arrived at Montreal.

The District Court sustained all of these exceptions, and the petitioner on appealing did not even assign as

error the ruling of the trial Court sustaining the exception to the Commissioner's report on the ground that he improperly made the findings of fact which the present petition and brief so largely rely on (R., 87; 1st Exception; R., 92-93, Final Decree Sustaining the Exceptions).

POINT I.

The collision recovery represented the value of the cargo at the time and place of shipment, Fort William (R., 12, 15) which the Scottish Company insured, and not the value at destination, Montreal. The increased value occurring after sailing and during the lake voyage, which the Standard Company insured, would be reflected or realized only in the Montreal price on the date of expected arrival. The Courts below, therefore, were clearly right in holding that the payment by the Standard Company under its policy on increased value based on the "Montreal quotation" (R., 63) was not a payment for any part of the cargo or its value as recovered in the collision suit.

We have in the statement of facts alluded to the fact that the increased value which the Standard Company insured was based on the Montreal price. As we gather from reading our opponent's petition and brief that he contests this fact, we quote the following from the agreed statement of facts:

> "Thereafter Louis Dreyfus & Company, through their brokers, R. F. Murray & Bro., Inc., *made a declaration to the Standard Marine Insurance Company, Ltd., under open policy No. 1010, covering the shipment in question, by letter dated October*

30, 1924, supplemented by detailed statement dated October 31, 1924. No certificate was issued by Standard Marine Insurance Company, Ltd., covering this shipment. True and correct copies of said letter of October 30, 1924, and said statement of October 31, 1924, are hereto annexed, marked Exhibits F and G respectively, and are made a part hereof" (R., 47). (Italics ours.)

We quote Exhibits "F" and "G" in full:

"EXHIBIT 'F'.

R. F. MURRAY & BRO., INC.,
Insurance
N. Y. Produce Exchange Building
No. 8 Broadway

New York City, October 30, 1924.

Toronto Insurance & Vessel Agency,
Toronto, Canada.

Gentlemen:

Re: Louis Dreyfus & Co.,
s/s GLENORCHY—Order No. 170.

Our assured has just received telegraphic advices from their Winnipeg Office, dated October 29th, reading as follows:

'GLENORCHY WHICH LEFT FORT WILLIAM OCTOBER TWENTY SEVENTH SANK THIS AFTERNOON COLLISION WITH L B MILLER.'

As soon as we receive further information in connection with this loss, we will advise you. As this steamer sailed on the 27th of October with shipment of grain for Montreal, we are figuring the number of days for this voyage to be ten days, *and insured value under our Assured's Open Policy will be figured on the basis of the highest C. I. F.,*

Montreal quotation during the ten days from October 27, to which, of course, is added 5c. as provided for in the policy.

As soon as the number of days elapse, we will forward you a statement showing the exact number of bushels shipped, with all other details and in the meantime would appreciate your prompt acknowledgment of this notice. (Italics ours.)

Yours very truly,

R. F. MURRAY & BRO., INC.,
G. E. WOODHOUSE.

GEW:WK."

"EXHIBIT 'G'.

LOUIS DREYFUS & Co.
Produce Exchange Building,

New York, Oct. 31st, 1924.

Debit Note for Messrs. R. F. Murray & Bro., Inc.,
New York, N. Y.
Lake Steamer GLENORCHY (A. 414-415)
Binder No. D 170 No. 2 Nor. Man.

	Highest market value on Oct. 27th $1.64¾ per bushel plus 5c.	$1.69¾
	CIF Invoice value per bushel,	1.38½
	Increased value per bushel	$ .31¼
10/26	Loaded at Ft. William	174,000 bus.
10/26	Loaded at Pt. Arthur,	26,000 bus.
16/26	Total loaded	200,000 bus.
	Lake Steamer GLENORCHY sank on October 29th being a total loss 200,000 bushels at $.31¼ per bushel	$62,500.00"

It is thus evident that the insurance taken out with Dreyfus related to the Montreal value and not the value at Fort William and Port Arthur, the place of shipment. Montreal was the place of delivery; Fort William and Port Arthur the place of shipment. With these facts in mind, the following observations of the District Court are irrefutable:

> "Upon consideration of the questions presented, I am constrained to take an opposite view from that reported by the Commissioner. The insurer is in equity subrogated to such rights only as the assured had. If the owner of the wheat is limited in his right to recover against the offending ship for loss based upon value at the time and place of shipment, it seems clear that subrogation can extend only to such limit of value. Since the owner of the cargo could not recover against the Miller for increased value based upon a market price at the point of delivery, no such right could pass to or be enforced by the Standard Company. * * *
>
> The indemnity provided by the Standard policy does not cover the character of loss for which recovery could be had by the owner against the Miller, and, therefore, the Standard Company is not entitled to prorate with the Scottish Company in the distribution of a fund representing actual value at the time and place of shipping. I think the Scottish Company entitled to full payment from the fund."

The collision fund in court which the assured had recovered, represented only the value of the cargo at the point and place of shipment. The assured had recovered nothing in respect of the value of the grain at Montreal, the port of destination. The Standard Com-

pany insured the market value of the grain at Montreal, less the C. I. F. value at Fort William and Port Arthur. In other words, the subject of the Standard Company's insurance was "increased value", as stated in its policy, representing the difference between the C. I. F. price at port of shipment and the expected value at Montreal, the port of destination. Consequently, it is only the remainder of the fund in court, after deducting the Scottish Company's claim in full, which represents any increase in value. As to that remainder, the controversy is solely between the assured, Dreyfus & Company, and the Standard Company. As was pointed out in the exceptions, the Commissioner was obviously wrong in his conclusions, because his entire reasoning was pyramided on the erroneous assumption that the fund in court represented an actual value of $1.69¾, the market value at Montreal. He apparently disregarded the fact which the parties had stipulated, and the Court had found by its decree in the collision suit, that the fund in court represented only the value at Fort William and Port Arthur, $1.54¾ per bushel on the date of shipment, plus shipping charges. The continued assumption by the Commissioner that the assured had recovered Montreal value, led him into misapplying every principle which he mentioned.

It is elementary that the measures of damages of the cargo owner in a collision suit against a non-carrying vessel, is the value at point and time of shipment, plus freight, insurance premium and other shipping charges.

In *The Oceanica*, 156 Fed. 306, 307, the Court said:

> *"That the proper rule of damages, where cargo is lost in transit on account of collision, is its value at the place of shipment, together with the carrying expenses incurred, is settled by the authorities. The Umbria*, 59 Fed. 489, 8 C. C. A.

194; *The Vaughan & Telegraph*, 14 Wall. 258, 20 L. Ed. 807; *The Scotland*, 105 U. S. 24, 26 L. Ed. 1001."

In *The Scotland*, 105 U. S. 24, 35, the "Kate Dyer", bound from Callao, Peru, for New York, with a cargo of guano, was in collision off Fire Island Light. This Court said (105 U. S., at pp. 35-36):

> "The question raised as to the rule of damages which should be adopted, in estimating the actual loss of the owners of the guano, was properly decided by the Circuit Court. *The rule is, the prime cost or market value of the cargo at the place of shipment, with all charges of lading and transportation, including insurance and interest, but without allowance for anticipated profits.*"

In *The Umbria*, 59 Fed. 489, 490, a collision case, the United States Circuit Court of Appeals for the Second Circuit said:

> "In some of the cases the cargo was a total loss, none of it having been recovered from the sunken vessel. In such cases, the correct rule of damages is to allow the value of the cargo *at its place of shipment*, or its costs, including expenses and charges and insurance and interest. See *The Aleppo*, 7 Ben. 120. The Commissioner correctly included among the expenses all the items which he allowed."

In *Smith* v. *Condry*, 1 How. (42 U. S.) 28, 35, this Court said:

> "It has been repeatedly decided in cases of insurance, that the insured cannot recover for the loss of probable profits at the port of destination, and that the value of the goods at the place of shipment is the measure of compensation. There

can be no good reason for establishing a different rule in cases of loss by collision. It is the actual damage sustained by the party at the time and place of the injury that is the measure of damages."

In *The Vaughan and Telegraph,* 14 Wall. (81 U. S.) 258, 267, this Court said:

> "In the District Court it was held that the proper rule of damages where a cargo is lost *in transitu* by a collision, or other tort, is *the value of the goods at the time and place of shipment.* It was conceded that upon the breach of a contract for the delivery of goods at a particular place the measure of damages is the full value of the goods at such place. Both propositions are correct and are well-settled in our jurisprudence."

In *The Aleppo,* 1 Fed. Cases No. 158 (S. D. N. Y.) a case of collision, the Court after exhaustively reviewing the authorities, said (at pp. 343 and 344):

> "The exceptions raise the question, whether the allowance for loss of cargo ought to be the market value of it in Boston at the time of the loss, less freight, duties, and charges for lading; or, whether it should be only the actual cost of the cargo when on board of the vessel at the port of shipment (including expense of lading), which may be regarded as its market value when on board, at such port, *without any addition for any increase in the market value* of like cargo at such port, occurring prior to the time of the loss; or whether it should be what the report allows, namely, the actual cost when on board of the vessel, at the port of shipment (including expense of lading), with the addition of the increase in the market value of like cargo at such port occurring

prior to the time of the loss. * * *. All these considerations lead to the conclusion that profits, on the supposition of the prosperous termination of the voyage, ought not, in any case, to constitute an item of damage."

And again in *The Aleppo*, 1 Fed. Cases No. 158, at pages 345 to 347, it is said:

"The libellants, in supporting their exception, contend that the proper measure of damages is the market value of the wool in Boston, on the day of its loss, less duties, freight and charges for landing, and less also (an item not referred to in their exception, or before the commissioner) the reasonable cost of insuring the cargo from the place of loss to Boston. They insist that this would give the value of the cargo at the time and place of its destination, and would be in accordance with the rule laid down in *Smith* v. *Condry* [1 How. (42 U. S.) 28]. But this construction of the rule would fritter it away altogether. * * *

It is contended by the libellants, that *Smith* v. *Condry* (*supra*), is overruled by *Williamson* v. *Barrett* (*supra*), if the former case is to be considered as laying down the rule, that *increased values* or expected profits or earnings can never be allowed as damages in collision cases. It is sufficient to say, that the supreme court, and the judges who concurred in the opinion of the court in the latter case, have never regarded the latter case as overruling the former. Mr. Justice Nelson, who delivered the opinion of the court in the latter case, cites the former case, in *The Ocean Queen* (*supra*), as settling the rule which is to govern on like questions in all cases of marine torts. In the case of *The Vaughan* and *The Telegraph* (*supra*), the supreme court sanction the

rule which in the same case, I had, on the authority of *Smith* v. *Condry* (*supra*), *adopted;* and in the very next case in the same volume (*The Cayuga,* 14 Wall. (81 U. S.) 270), the same court maintains the doctrine of *Williamson* v. *Barrett* (*supra*), that reasonable demurrage, for unavoidable detention while repairing an injured vessel, is a proper charge in all suits for damages by collision. * * *

It is equally impossible to sustain the rule of damages adopted by the commissioner. The general *increase in market* value, between the time of shipment and the time of the collision, was claimed and disallowed by the circuit court for this district, in the case of *The Ocean Queen* (*supra*). I should feel bound by that decision, so long as it was not overruled, even if I did not concur in its propriety. But it seems to me a correct decision. No principle of *restitutio in integrum,* or of putting the suffering party as nearly as possible in the same situation in which he would have been if no collision had taken place, or of giving him the actual damage sustained by him at the time and place of the injury, or of giving him indemnity to the extent of the loss sustained—as the general rule is thus variously expressed—requires or admits an allowance made on the principle adopted by the commissioner in this case. * * * It had, however, no further value to them, at that place, and their actual loss was nothing more than such money, with interest. Restoring to them that money, with interest, restores all they actually lost. *All beyond that was expected profits.* The wool was not in Montevideo, so as to have applied to it *any increase in market value, after it left there,* which might have applied to it if it had remained there

and been sold. *The increase in value after it left there, and while it was on the voyage based on an increase in the value there of like wool is as much contingent as an increase in its value* based on a price of like wool in Boston, at the time of the loss, higher than the price paid in Montevideo. The value of the wool to these libellants at the time and place of the loss, was only what it cost them to buy it and convey it to the place of loss, with interest. So, too, they cannot be allowed for any increase in market value at Montevideo or other place of purchase or shipment, between the time of purchase and the time of shipment. The rule is one which must operate uniformly in all cases."

See also *The Old Reliable,* 262 Fed. 108, 110 (C. C. A., 4), where the Court said:

"The value of the ties at place of destination was charged to respondent, 93 cents for No. 1 and 83 cents for No. 2. The profit, which we understand to mean the difference between the original cost, together with freight and insurance, other costs of transportation, and the selling price, was to be 15 cents on each tie. *In Admiralty* the measure of recovery for goods lost is the price at the place of purchase, together with freight, insurance, and other charges of transportation *without profit.* The profit, 15 cents each, should be deducted, and the ties charged at 78 cents for No. 1 and 68 cents for No. 2."

In *Guibert* v. *British Ship George Bell,* 3 Fed. 581, 584-585, the Court said:

"No matter how near the vessel may have reached to her port of destination, the market price at the port of destination is not allowed to

enter into the estimate of the value, and all profits or *probable benefits* which would have resulted from the termination of a voyage almost completed, *are rigorously excluded. The Amiable Nancy,* 3 Wheat. 546; *The Lively,* 1 Gull. 314 (315); *Smith* v. *Condry,* 1 How. 28; *The Vaughan* and *The Telegraph,* 14 Wall. 258, 267; *The Aleppo,* 7 Ben. 120, 124."

We have quoted at length from these authorities, so that it will be quite clear that in a collision case an increased value such as the Standard Company insured, is excluded from the recovery. We have italicized passages in the various opinions where the Courts deliberately point out that the reason the value at port of shipment should be taken is that the value at destination included "increased value". The assured, therefore, had no cause of action upon a market value at destination, Montreal. Hence as such "increased value" is what the Standard Company insured there was nothing to which the Standard Company could be subrogated in respect of such "increased value". The Courts below were, therefore, quite correct, when they held that as the assured had no cause of action, in respect of increased value, there was nothing to which the Standard Company could be subrogated in respect of such increased value. For, as said by those Courts, the assured could only subrogate the insurer in respect of rights which the assured had. This is the well established equity rule.

In *Phoenix Insurance Company* v. *Erie and Western Transportation Company,* 117 U. S. 312, at page 320, this Court said:

"When goods insured are totally lost, actually or constructively, by perils insured against, the insurer, upon payment of the loss, doubtless

becomes subrogated to all the assured's rights of action against third persons who have caused or are responsible for the loss. No express stipulation in the policy of insurance, or abandonment by the assured, is necessary to perfect the title of the insurer. From the very nature of the contract of insurance as a contract of indemnity, the insurer, when he has paid to the assured the amount of the indemnity agreed on between them, is entitled, by way of salvage, to the benefit of anything that may be received, either from the remnants of the goods, or from damages paid by third persons for the same loss. But the insurer stands in no relation of contract or of privity with such persons. *His title arises out of the contract of insurance, and is derived from the assured alone, and can only be enforced in the right of the latter.*" (Italics ours.)

The subject matter of the insurance here effected by the Standard Company was the "increased value". It was so specified in the Standard Company's policy. The policy provided that it was to recover "increased value" on grain, and that such increased value was to be arrived at by taking the difference between the C. I. F. invoice cost and the highest market value per bushel, plus 2 cents, as set out in The New York Journal of Commerce, at the port of final delivery. The assured, in making their declaration, which was accepted by the Standard Company, stated the Montreal price as the market value contemplated in the contract. This declaration was accepted and the loss was subsequently adjusted on the declaration so made. The subject matter of the insurance, therefore, of the Standard Company, was the profit between the C. I. F. price at Port Arthur and the price at Montreal, the port of final delivery.

Such a subject matter of the insurance was identical with that described in *Canada Sugar Refining Co.* v. *Insurance Co.*, 175 U. S. 609, at page 625, where such an interest was under discussion by this Court. This Court quoted with approval the following language from Phillips on Insurance:

> "The profit, then, which is the subject of a policy upon this interest is the excess of the value of the subject at the port of destination over its value at the shipping port."

And in *Thames & Mersey Marine Insurance Co.* v. *British & Chilean S. S. Co.*, 13 Asp. Mar. Cas. 221; (1916) 1 K. B. 30, Scrutton, *J.*, now one of the Lord Justices of the Court of Appeal and one of the most eminent English authorities on the law of insurance, held that an underwriter was only entitled to subrogation TO THE EXTENT TO WHICH IT HAS PAID IN RESPECT OF THE SUBJECT MATTER INSURED.

The declaration (Exhibit F at p. 63 of the Record) and the debit note (Exhibit G at p. 64 of the Record), on which the appellant computed and paid the loss under its policy show that what it insured was the value on October 27th not of this cargo of wheat which was on that date at Fort William, but of a similar quantity of wheat on that date at Montreal.

> "Insured value under our assured's open policy will be figured on the basis of the highest c. i. f. Montreal quotation during the ten days from October 27th, to which, of course, is added five cents, as provided for in the policy" (R., 63).
>
> "Highest market value on October 27, $1.64¾ per bushel, plus five cents—$1.69¾" (R., 64).

The undisputed evidence shows that on that same date, October 27th, the value of this cargo on the "Glenorchy", which was then at Fort William, was only $1.54¼ per bushel, and that is all that was recovered in the collision suit (R., 12). The difference between the value—$1.54¾ per bushel—of this cargo on the "Glenorchy" as it existed at Fort William on October 27th, and the value of a hypothetical similar quantity of wheat at Montreal on the same date—$1.64¾—is ten cents per bushel. This difference was not recovered in the collision suit and is the difference or increase in value which the appellant insured. The suggestion of counsel for appellant that this cargo, as it actually existed at Fort William, had, in addition to its value at Fort William, a value at a far distant point, namely, Montreal, shocks common sense. It is obvious that the increased value which the appellant insured was the anticipated profit which appellant's assured expected to derive if the cargo actually arrived at Montreal. But it is just this element of anticipated profit which is not recoverable in a collision suit and which was not recovered here. It is an elementary principle of marine insurance law that an insurance on profits is not an insurance on the cargo, or on the property itself and, therefore, does not entitle the underwriter to subrogation if any loss is paid. Indeed, this Court held long ago that a cargo owner could establish a total loss under a policy on profits by merely showing that the cargo did not in fact arrive at destination without showing that the cargo or any part of it was lost. *Patapsco Ins. Co.* v. *Coulter*, 3 Peters (U. S.) 222.

POINT II.

The Standard's policy was in fact insurance on increased value or profit, and was not insurance on the cargo.

In *Strass* v. *Spillers*, Law Reports (1911), 2 King's Bench Division 759, the Court held that a policy taken out by the shipper on "increased value" of a cargo of wheat was not a policy on the cargo itself and therefore that the shipper need not deliver that policy to the buyer under a C. I. F. contract with the cargo policies and was himself entitled to retain permanently any money collected under the increased value policy in case the cargo should not reach destination, notwithstanding the loss occurred after the shipper had sold the goods to the buyer. This decision is squarely in point to the effect that a policy on increased value of cargo is not a policy on the cargo itself. The syllabus in that case reads as follows (1911, 2 King's Bench Division at p. 759):

> "The defendants bought a cargo of wheat at a price to cover cost, freight and insurance under a contract which contained the clause 'Seller to give policies of insurance (free of war risk) for 2 per cent. over the invoice amount, and any amount over this to be for seller's account in case of total loss only'. In order to fulfil the contract the seller bought a cargo of wheat from a person to whom the plaintiff had sold it, the contracts throughout being in the same form and containing the above clause. The plaintiff handed over to the buyer from him a policy for 2 per cent. over the invoice amount, and this policy was handed over to the defendants in due course.

The plaintiff, before selling the cargo, had taken out an honour policy on increased value of the wheat for his own benefit, which policy he retained in his own possession. A loss having occurred, the underwriters paid the defendants the full amount under the policy which had been handed over to them. The plaintiff then sent the increased value policy to the defendants, requesting them to collect from the underwriters the amount payable thereunder. The defendants did so, and upon being paid the amount by the underwriters they claimed to retain it upon the ground that under the contract of sale the plaintiff was bound to hand over all policies effected on the wheat at the time when he entered into the contract of sale. In an action by the plaintiff to recover the amount as money had and received to his use:

Held, that, as the increased value policy was an independent honour policy effected by the plaintiff for his own benefit, the defendants were not entitled to it under the contract, and that the plaintiff was entitled to recover the amount received by the defendants thereunder as money had and received to his use."

The Court in that case held that if the policy on increased value of cargo had been tendered to the buyer as one of the policies under the C. I. F. contract it could properly have been rejected by the buyer on the ground that *IT WAS NOT EXPRESSED TO BE UPON CARGO, BUT UPON INCREASED VALUE OF CARGO* (at p. 768 of (1911) 2 K. B. D.). Referring to the increased value policy, the Court held that:

"It is to be observed that the policy is expressed to be *ON INCREASED VALUE;* to pay as cargo, showing that *IT IS NOT IN THE ORDINARY SENSE A MERE INSURANCE ON CARGO.*

> * * * It was a legitimate speculation, carried out by means of honour policies, in view of the rise in the market value of wheat, which might lead the plaintiff to desire to have further business protection than the other policies would give him. An experienced broker at Lloyd's was called, whose evidence was not in any way challenged, and he stated that this form of insurance is common, *NOT AS A MODE OF INSURING CARGOES, BUT, AS I UNDERSTOOD HIM, AS ANCILLARY TO THE TRADE IN GRAIN*" (pp. 768 and 769 of 1911, 2 K. B. D.).

And referring to the contention of the buyer in that case (the appellant in the present case), the Court said at page 774 of 1911, 2 K. B. D.:

> "They must have appreciated from the terms of the policies that this was not the kind of policy which is tendered for payment by an ultimate receiver of the goods, but is such a policy as is tendered by persons who wish independently to insure the goods to protect themselves against the fluctuations of the market."

Mr. Justice Hamilton, delivering judgment in the *Strass* case, said (1911, 2 K. B. D. at p. 768):

> "It is to be observed that the policy is expressed to be *ON INCREASED VALUE;* to pay as cargo, showing that *IT IS NOT IN THE ORDINARY SENSE A MERE INSURANCE ON CARGO* * * *."

The Commissioner discusses at length *The Livingstone*, 130 Fed. 746. He says:

> "So in the case at bar, if Dreyfus and Company could not profit by their loss, neither should the

Standard Marine Insurance Company or the Scottish Metropolitan Assurance Company" (R., 75).

It is obvious that neither the Scottish Company nor the Standard Company profited or can profit by this loss or recovery and this reasoning of the Commissioner is due to his misunderstanding of the question which was before him for determination. *Dreyfus & Company could and did profit by their loss.* They recovered from the Standard Company $37,000 more than the actual value of the grain and this profit rightfully belonged to them. The only conclusion that can be drawn from this fact is that Dreyfus insured this "increased value" or profit with the Standard Company.

In *Canada Sugar Refining Company* v. *Insurance Company of North America*, 175 U. S., at page 625, this Court said:

> "The profit, then, which is the subject of a policy upon this interest *is the excess of the value of the subject at the port of destination over its value at the shipping port.*"

Similarly in the present case, the "increased value" insured by the Standard Company was in legal effect "profits" because it did not represent an actual value and/or expenditure or investment made. The increase in value should not occur until the wheat should arrive at Montreal and thus earn or bring into existence the "value". The only conclusion to be derived from this state of facts is that reached by the Courts below, viz.: that as there had been no recovery in respect of such increased value there was nothing to which the Standard Company could be subrogated in respect of such increase.

POINT III.

There was no double insurance because the American rule was incorporated by special provision in both the policy issued by the Standard Company and that issued by the Scottish Company. Under the American rule, the Standard policy being subsequent in time, did not attach as to any insurance effected on the grain by the Scottish Company.

We have pointed out in the previous portion of this brief, that the Scottish Company's insurance was effected before the grain became the property of Dreyfus and while it was still the property of the Canadian Co-operative Wheat Producers, Ltd., and that the Standard's policy did not attach until the grain became the property of the Dreyfus Company. Hence, it is obvious that the insurance of the Scottish Company was prior in date to that of the Standard Company. The Standard Company's policy provides:

> "Provided always, and it is hereby further agreed, that if the said insured shall have made any other insurance upon the property aforesaid, prior in date to this policy, then this Company shall be answerable only for so much as the amount of such prior insurance may be deficient towards fully covering the property hereby insured; and this Company shall return the premium upon so much of the sum by them insured as they shall be by such prior insurance exonerated from. And in case of any insurance upon the said property, subsequent in date to this Policy, this Company shall nevertheless be answerable for the full extent of the sum by them subscribed hereto, with-

out the right to claim contribution from such subsequent insurers, and shall accordingly be entitled to retain the premium by them received, in the same manner as if no subsequent insurance had been made."

The Scottish Company's policy provides:

"PROVIDED ALWAYS, and it is hereby further agreed, that if the said Insured shall have made any other insurance upon the goods aforesaid, prior in day of date to this Policy, then the said Assurers shall be answerable only for so much as the amount of such prior insurance may be deficient towards fully recovering the goods hereby insured; and the said Assurers shall return the premium upon so much of the sum by them insured, as they shall be by such prior insurance exonerated from. And in case of any insurance upon the said goods subsequent in date to this Policy, the said Assurers shall nevertheless be answerable for the full extent of the sum by them insured, without right to claim contribution from such subsequent insurers, and shall accordingly be entitled to retain the premium by them received, in the same manner as if no such subsequent insurance had been made. Other insurance upon the goods aforesaid, of date the same day as this Policy, shall be deemed simultaneous herewith; and the said Assurers shall not be liable for more than a ratable contribution in the proportion of the sum by them insured to the aggregate of such simultaneous insurance."

In Winter on Marine Insurance, New York, 1919, page 164, it is said:

"The American theory of double insurance as herein set forth is that if insurance has been effected prior in day of date to the policy in ques-

tion the underwriter shall be relieved of all liability for loss except in so far as the prior policy is deficient in amount, not fully protecting the property insured. The insurance company agrees to return premium on so much of the amount as is over insurance.

If there are two or more policies on the same property and aggregating in amount more than the insured value of it, simultaneous in day of date, then the various underwriters become co-insurers, each agreeing to be responsible for his *pro rata* proportion of the loss and each retaining his *pro rata* share of the premium. If the policy in question, however, is prior in date to any other policy then the underwriter agrees to assume full responsibility for loss to the amount of his policy, and is entitled to retain the full premium charged."

The parties, therefore, by their own agreements, have clearly provided that the subject-matter of the two insurances was not the same. One is insurance on cargo and the other is insurance on increased profits.

POINT IV.

The decisions below do not conflict with the decision in the Ninth Circuit in *Brown* v. *Merchants Co.*, 152 Fed. 411.

The facts in *Brown* v. *Merchants Marine Insurance Company*, 152 Fed. 411, discussed at length by petitioner, are wholly different from those in the present case. It deals entirely with hull insurance and not cargo insurance, and with a situation where the value of the insured property was *in excess* of the aggregate of all of the insurance there involved. In the case at bar the value

of the insured property was *less* than the aggregate of insurance on cargo plus insurance on increased value. In the recent case of *Gulf Refining Co. v. Ins. Co.*, 279 U. S. 708, where this Court was considering cargo insurance, the American cases dealing with hull insurance were cited to induce the Court to reach a conclusion which was not in accord with the decisions of the English courts. At page 715 of the opinion this Court took occasion to say:

> "The other American cases have dealt with insurance on hulls and so are not decisive."

In the *Brown* case the actual value of the property involved was $140,000. Owing to the fact that the amount recovered was reduced to $47,426.97 because both vessels were to blame, there was a dispute as to how this sum was to be divided. There was insurance on hull and other insurance on disbursements. As appears from the tabulation on page 10 of the petitioner's brief, the owner of the "City of Kingston" was co-insurer to the extent of $48,000, but it appears from the report of the case, 152 Fed. at page 412, that the owner received nothing in respect of its interest as a co-insurer, for the Court says (page cited):

> "In February, 1904, the District Court ordered the payment to the said insurance companies, other than the appellees herein, of all the funds then in the court, save in the sum of $4,132.92, and subsequently, under the order of the court, that sum was paid to the appellees herein."

If counsel for petitioner's reasoning in connection with the *Brown* case were correct, the owner of the "City of Kingston" would obviously have received a part of the recovery. But it is clear from the reports that the owner did not receive any part of it. And the precise opposite of the petitioner's contention in this respect has again

been decided as the settled rule in the recent English case of *Goole* v. *Ocean Marine Ins. Co.*, L. R. (1928) 1 K. B. D. 589, 29 Lloyds List Law Reports 242, at pages 245 and 246. Therefore the novel rule suggested by counsel for petitioner should not be adopted, for the reason announced in *Gulf Refining Co.* v. *Atlantic Mutual Marine Insurance Company*, 279 U. S. 708, and in *Queens Insurance Company* v. *Globe & Rutgers Fire Insurance Company*, 263 U. S. 487, 493, where this Court said:

> "There are special reasons for keeping in harmony with the marine insurance laws of England, the great field of this business."

Especially is this true when all of the parties are, as in the present litigation, British subjects and the contracts were made in a British dominion and the carriage of the grain was from one British port to another British port.

The inapplicability of the decision in the *Brown* case seems obvious from the fact that the actual value in that case was in excess of the insured value, whereas here the actual value was less than the insured value. In the *Brown* case the actual value was $140,000 and the insurance was far less than that sum. This appears from page 10 of petitioner's own brief. Here the actual value was $308,000 and the insured value was in excess of that sum, and the whole dispute in this case arises from the fact that the insured values were in excess of the actual value.

CONCLUSION.

The petition for a writ of certiorari should be denied.

T. CATESBY JONES,
JAMES W. RYAN,
Counsel for Respondent.

FILE COPY

FILED
MAR 18 1931
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1930.

No. 261.

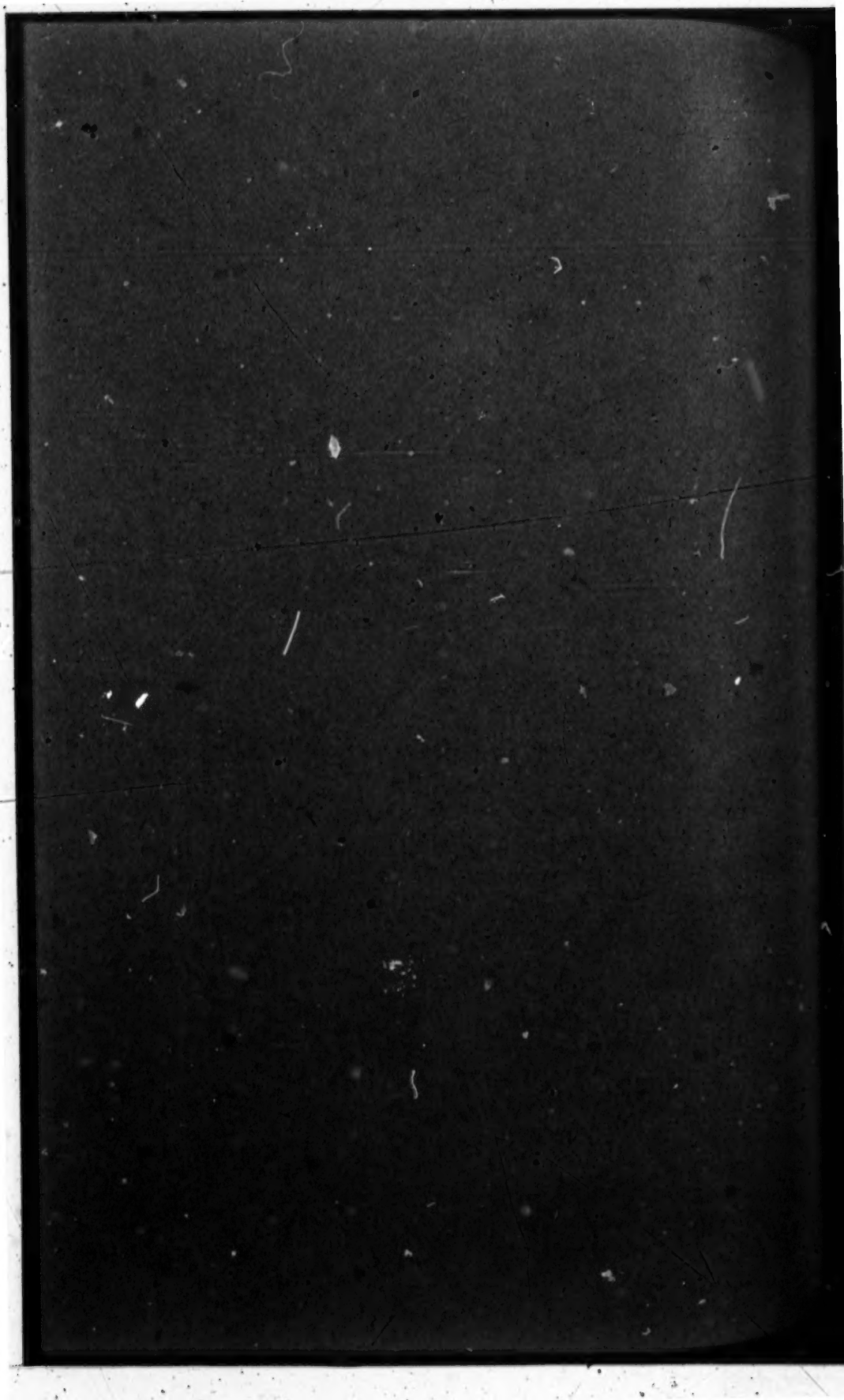
STANDARD MARINE INSURANCE COMPANY, LTD.,
Petitioner,

—against—

SCOTTISH METROPOLITAN ASSURANCE COMPANY, LTD.,
Respondent.

BRIEF ON BEHALF OF RESPONDENT.

T. CATESBY JONES,
JAMES W. RYAN,
Counsel for Respondent.



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IN THE

Supreme Court of the United States

OCTOBER TERM, 1930.

No. 261.

STANDARD MARINE INSURANCE COMPANY, LTD.,
Petitioner,

—against—

SCOTTISH METROPOLITAN ASSURANCE COMPANY, LTD.,
Respondent.

BRIEF ON BEHALF OF RESPONDENT.

Opinions Below:

In re Columbia S. S. Co., 28 Fed. (2d) 540 (N. D. Ohio; Jones, *J.*); R. 86;
Standard Co. v. Scottish Co., 39 Fed. (2d) 436 (C. C. A. 6); R. 97; affirming District Court.

The Facts.

The petitioner's open policy (R. 20-29; 63), and the assured's declarations under it (R. 47, 60-61, and 63); and the respondent's Lake Contract (R. 46-56) and certificate of insurance (R. 58-59) are printed in full in the record.

The facts have all been found concurrently by both

Courts below and are set forth in their opinions (Opinion District Court, R. 86; Opinion Circuit Court of Appeals, R. 97).

As the facts are succinctly stated and concurrently found in the opinions below, we do not deem it necessary to enlarge this brief unduly by pointing out the numerous inaccuracies of fact, and assumptions outside the record, in counsel for petitioner's brief. Much of the evidence submitted to the courts below has been incorporated in an agreed statement (R. 41-61).

It is difficult to understand how it is possible for petitioner to question the concurrent finding of fact that there was no recovery of any "increased value" of cargo in the collision suit. The Trial Court's finding and certificate of that fact is final and conclusive as to what that Court's records in the collision suit contain. The petition which the petitioner filed in the Trial Court, and which is the proceeding involved here, is merely an excrescence grafted onto the collision suit after the collision recovery had been effected by the respondent in the assured's name. We emphasize this because counsel for petitioner bases his entire brief on the entirely unwarranted assumption that the petitioner may participate in the distribution of the fund without first establishing the fact that "increased value" as insured by it was recoverable and was in fact recovered by the assured in the collision suit. Neither of these assumptions is founded in fact or in law, or on anything in the record in the present case. Indeed, a careful search of the reported cases has failed to disclose any other case in which counsel for an "increased value" underwriter on cargo has even contended that it is entitled to sue, or participate in the suit, in the assured's name against a wrongdoer for collision damages.

Counsel for petitioner offered no evidence whatever in the Trial Court to support any of the alleged practices or usages he mentions in his brief. (See Petitioner's Brief, pp. 13, 14, 15 and 19.) Nor did the petitioner make any allegations with reference to them in the petition or pleading filed by it. If it had done so, we submit that opposing evidence would have conclusively established the non-existence of such supposed usages. Counsel for petitioner's argument is therefore in a substantial sense based on statements entirely outside the record.

The petitioner also has not alleged and has not introduced any evidence to show that the "increased value" which was insured in its policy was more than an arbitrary value, with an option to the assured to select the highest price during the period mentioned in the policy, without reference to actual value either at time or place of shipment or at time and place of expected arrival. By its declaration under the policy (Exhibit F, R. 60) petitioner interpreted this sliding scale as being applicable over a period of ten days. It is plain, as both Courts below have found, that if the petitioner's policy did assumedly represent an element of market value or cost at any place, that place was Montreal. Yet the stipulation and the record show specifically that no part of the expected price at Montreal was recovered from the wrongdoing vessel and that the collision recovery fund represents only the value at the port of shipment, Fort William, which was precisely what the respondent's policy insured in full on an agreed valuation. The assured could therefore recover under the respondent's policy only the exact full value at the port of shipment as agreed. The assured, having been indemnified in full to that extent by respondent, the latter was subrogated to the full

recovery of that precise sum and value from the wrongdoer; and the respondent did in fact maintain and effect that recovery in the assured's name under its right of subrogation. It is therefore necessary for counsel for petitioner, in order to maintain his position, to establish that the petitioner is entitled to recover more from the wrongdoer in the collision suit than the assured himself could recover. And counsel for petitioner's argument is also based on the unfounded assumption that the petitioner has greater rights against the respondent than the assured itself has. Long before declaration of this shipment under petitioner's policy, the assured had contracted that the respondent should insure the cargo to its full value on an agreed full valuation which was not capable of being increased or reduced either because of fluctuations in the market price or otherwise. The assured could not afterwards, without the respondent's consent—which was never asked for or given—increase or reduce the agreed insured valuation of the cargo by secretly applying to another insurance company for "increased value" insurance on a valuation which was (if construed according to petitioner's contention) higher than the agreed valuation in the respondent's policy. There is no usage authorizing such remarkable conduct by an assured and counsel for petitioner did not plead or offer evidence to establish such a usage.

The foregoing is entirely aside from and in addition to the fact that, as both Courts below have found, the petitioner's policy contained a clause which specifically provided that its insurance was not to be insurance, or to attach at all, in so far as any insurance had already been effected on the cargo with another company. We have been unable to find anything in the petitioner's brief to explain how, in view of that clause, its counsel's

present contentions are even worthy of consideration. The obvious materiality of that clause cannot be avoided by the attempt at page 23 of petitioner's brief to dismiss it summarily as immaterial. And at pages 25 and 26 of his brief counsel for petitioner in referring to clause 3 of petitioner's policy neglects to inform this Court that the "c. i. f. price" therein mentioned refers to *Montreal* and not to Fort William, the port of shipment. This conclusively appears from the invoices (Exhibits A and B, R. 45 and 46).

In view of the facts which were concurrently found by the Courts below, and which were based in every respect on the actual record before them, we submit that they were not only clearly right in holding that the petitioner could claim nothing by way of subrogation as to any increased value beyond that of the port of shipment, but that that was the only conclusion that they logically could have reached.

POINT I.

The fund involved in this controversy, the collision recovery, represents the value of the cargo at the time and place of shipment, Fort William, which respondent insured, and not the value at destination, Montreal. That fund constituted the whole subject matter insurable as cargo (Phillips on Insurance, §1226, §1229; Arnould on Marine Insurance, §365). The increased value occurring after sailing and during the lake voyage, which petitioner insured, could be realized only in the Montreal price after arrival at Montreal. The courts below, therefore, were clearly right in holding that the payment by the petitioner under its policy on increased value based on the "Montreal Quotation" was not a payment for any part of the cargo or its value as recovered in the collision suit, and no subrogation flowed therefrom.

In our statement of facts we have alluded to the fact that the petitioner's insurance was based on the Montreal price, and that its insurance was limited to "increased value" only. In Exhibit "F" (R. 60), in making its declaration, the assured stated that the insured value under petitioner's open policy would be "figured on the basis of the highest C. I. F. Montreal quotation during the ten days from October 27, to which, of course, is added 5c. as provided for in the policy." Then in Exhibit "G" (R. 60-61) this Montreal value is figured at $1.64¾ and 5c. is added thereto because of the provision in the petitioner's policy, thus making the maximum agreed value on the Montreal quotation $1.69¾.

From this sum the C. I. F. invoice value is deducted, leaving a balance of 31¼c., thus supplying the agreed value at which the "increased value" was insured. It appears from the invoices, Exhibits A and B (R. 45 and 46) that the "c. i. f." referred to *Montreal*. It is thus evident that the insurance taken out by Dreyfus with the petitioner related to the Montreal value and not to the value at Fort William or Port Arthur, the place of shipment. And such difference between cost and price at Montreal was obviously nothing but hoped-for "profits" to be realized after arrival at Montreal.

The petitioner's entire argument is based upon a misconception of what is the proper value of cargo for insurance purposes. That value, according to marine insurance law and practice as settled from time immemorial, both in this country and in England, is the value at the time and place of shipment. In Phillips on Insurance, Section 1226, it is said:

> "The amount of insurable interest in goods is their market value at the time and place of the commencement of the risk.
>
> The best, though not conclusive, criterion, of this interest, is the cost of the goods to the assured. This is the most satisfactory proof of the value, in case they are purchased near the time when the risk commences."

The reason that the value at the time and place of shipment is taken as the proper actual value of the cargo, both of cargo as the subject matter of insurance and of cargo in a collision case, is well stated in the case of *The Ocean Queen* (a collision case), Fed. Cases No. 10,409, page 555:

> "To estimate the damage by what the cargo

> would have sold for if it had reached the port of destination partakes in some measure of conjecture, and assumes that for certain which is after all contingent. The schooner in this case might never have reached her port of destination, even if she had not collided with the 'Ocean Queen.'"

Indeed, the rule that the recovery by cargo in a collision case is limited to the market value at time and place of shipment was adopted because of the insurance rule. See *Smith* v. *Condry*, 1 How. (42 U. S.) 28, 35, where this Court said:

> "It has been repeatedly decided in cases of insurance, that the insured cannot recover for the loss of probable profits at the port of destination, and that the value of the goods at the place of shipment is the measure of compensation. There can be no good reason for establishing a different rule in cases of loss by collision. It is the actual damage sustained by the party at the time and place of the injury that is the measure of damages."

It is because of the operation of this rule that the collision fund in court which the assured had recovered, represented only the value of the cargo at time and place of shipment. The difference insured by the petitioner represents a Montreal price at an indeterminate time subject to the option of the assured, *i. e.*, the petitioner insured the market value of the grain at Montreal, less prime cost, *i. e.*, invoice value at Fort William and Port Arthur, and not grain at Port Arthur. In other words, the subject of the petitioner's insurance was "increased value" on a Montreal price, as stated in its policy and

declaration Exhibit F (R. 60), and not a basic risk (R. 26), *i. e.*, the cargo at port of shipment. It is only the remainder of the fund in court, after deducting the respondent's claim in full, which represents any increase in value at time and place of shipment. As to that remainder, the controversy is solely between the assured, Dreyfus & Company, and the petitioner, and both courts below awarded it to petitioner.

In Section 1229, Phillips elaborates as follows:

> "The amount of interest in goods is most frequently the invoice price. But stating a price in the invoice does not determine the amount of interest any further than as it is a proof of the actual cost.
>
> A quantity of hides insured was invoiced at twelve cents per pound, which sum they were worth, but they had cost but ten cents; the court said, 'Generally speaking, the prime cost is the best rule by which to test the value;' and it was held that they should be estimated at ten cents. But the court said, 'The prime cost might not be a just rule where the goods had remained on hand a considerable length of time.' In such case the market price may have greatly varied; and the market price at the commencement of the risk is the true amount of insurable interest. The prime cost is not, therefore, conclusive proof of the value. Yet the court always leans in favor of the actual cost.
>
> Where the risk on cotton was to commence at the Isle of France, and it was invoiced at the value there, which was more than the cost to the assured, the court held that the interest was to be estimated according to the invoice.
>
> 'Suppose,' says Mr. Justice Washington, 'the

property to be destroyed within an hour after the risk has commenced (and the time makes no difference in principle), what does the owner lose? Precisely as much as it was worth, or would have commanded in the market at the time and place it was shipped. If the property cost him less than it was worth when shipped, he loses (in case of total loss), as well the first cost as the increased value, for which he is entitled to claim indemnity from the insurer. If it costs him more, he can have no claim under the contract (of insurance) for the difference between the first cost and diminished value. It is impossible that the first cost can furnish a just rule of indemnity, when it exceeds or falls short of the actual value of the property when it is put at risk. The invoice price furnishes no rule of indemnity in any case where it exceeds or is less than the market value."

In Arnould on Marine Insurance (11th Edition 1924), Section 365, it is said:

"The prime cost of goods is generally evidenced by the invoice price, but is not conclusively fixed by it. In the United States it has been laid down on several occasions, that the market price of the goods at the commencement of the risk, is the true basis of calculation, and that the prime cost or invoice price furnishes no satisfactory rule of indemnity in any case where it exceeds, or is less than, this market value. 'Suppose,' says Washington, *J.*, 'the property to be destroyed within an hour after the risk has commenced, what is it the owner loses? Precisely as much as it is worth, or would have commanded in the market at the time and place of shipment. If the property cost him less than it was

worth when shipped he loses (in case of total loss) as well the first cost as the increased value for which he is entitled to claim indemnity from the insurer.' In theory this is unquestionably true, but as a practical rule, the prime cost, as evidenced by the invoice price, is by far the most convenient standard."

The respondent's insurance covered the grain "Valued at $1.42 per bushel" (Exhibits D and E, R. 56 and 58). This valuation had in the earlier Lake Contract (Exhibit C, R. 46, at p. 54, clause 4) been built up on the basis of invoice plus ten per cent (freight being ignored because not involved in this litigation). Later, the assured, Dreyfus, took out insurance on what was termed "increased value" on the excess of Montreal quotation over c. i. f. Montreal price (R. 25, 45). Because the assured and the petitioner agreed upon a valuation of such increased value in excess of the market value at the time and place of shipment, there is an insufficient fund to reimburse both the petitioner and the respondent. The respondent had nothing to do with the valuation agreed upon by the petitioner and the assured. The respondent was in no way party to that contract, and no good reason can be assigned for penalizing the respondent because the petitioner and the assured elected to value the subject matter insured by petitioner at a valuation in excess of the market value at time and place of shipment. If as petitioner argues the agreed value in respondent's policy does not bind him, it follows, as a matter of course, that the agreed value in petitioner's policy does not bind respondent. Respondent's policy was the first to attach, and until petitioner's policy attached, the assured was a co-insurer for any excess in his insurable interest. But as appears from Phillips and Arnould his insurable in-

terest in the cargo was only the difference between the cost and the value at the time and place of shipment, that sum in any view was all that the assured had the right to insure except as profits. And as the recovery was limited to that sum it was as both Courts below held the only sum to which the petitioner could be subrogated.

In ruling as they did, both courts below acted in accordance with the view expressed by this Court in *Gulf Refining Co.* v. *Atlantic Mutual Insurance Company*, 279 U. S. 708, at page 712. There this Court said:

> "The policy agreement valuing the cargo at a specified amount is not a representation, or so regarded. It is no more than a stipulation, in effect, that for purposes of computation of the insurance liability the cargo shall be taken at an agreed value. Within this limitation the policy is still a policy of indemnity and the insured must prove the sound value of the cargo in order to ascertain his actual loss, by deducting from it the amount of the proceeds of the damaged cargo. In every particular average adjustment the insurer may rely on the sound value of the cargo in order to establish the extent to which the insured is a co-insurer."

The Court in this passage is speaking of particular average losses. Here we have a total loss. As we have shown from Phillips and Arnould, in a case of total loss, where there is no agreed valuation, the adjustment is based upon either the prime cost or the value at the time and place of shipment. What happened here was that for the practical reasons mentioned by Arnould, the cargo as such was insured at an agreed value, based upon the prime cost (R. 54). Conse-

quently, in so far as the cargo is concerned, there was in effect no co-insurer. But if the view should be taken that the assured was a co-insurer in respect of the difference between the cost and the value at the time and place of shipment, the assured even under such a view would be only a co-insurer in so far as respondent's insurance was less than the value at the time and place of shipment. If, as petitioner urges, his policy be considered as a policy on cargo, it can be such a policy only in so far as it relates to so much of the cargo for which the owner was a co-insurer after the assured had concluded his bargain with respondent. Both courts below permitted the petitioner to be subrogated in respect of such sum, and, as the Circuit Court of Appeals said, this was the only sum which the assured had to which petitioner could be subrogated. For after the assured had fully insured the grain at its prime cost, nothing remained for insurance in so far as the insurable value of the grain was concerned, other than the difference between the prime cost and the value at the time and place of shipment. The fact that the assured elected to tack on to such insurance an insurance on profits anticipated at destination, certainly in no way can affect respondent.

The rule laid down in *Smith* v. *Condry, supra,* has been repeatedly followed. In *The Vaughan* and *Telegraph,* 14 Wall. (81 U. S.) 258, 267, this Court said:

> "In the District Court it was held that the proper rule of damages where a cargo is lost *in transitu* by a collision, or other tort, is *the value of the goods at the time and place of shipment.* It was conceded that upon the breach of a contract for the delivery of goods at a particu-

lar place the measure of damages is the full value of the goods at such place. Both propositions are correct and are well-settled in our jurisprudence."

And in *The Scotland,* 105 U. S. 24, 35, this Court said:

> "The question raised as to the rule of damages which should be adopted, in estimating the actual loss of the owners of the guano, was properly decided by the Circuit Court. The rule is, the prime cost or market value of the cargo at the place of shipment, with all charges of lading and transportation, including insurance and interest, *but without any allowance for anticipated profits.*" (Italics ours.)

See also *The Umbria,* 59 Fed. 489, 490. And see *The Aleppo,* 1 Fed. Cases No. 158, Southern District of New York, where the Court said:

> "The exceptions raise the question, whether the allowance for loss of cargo ought to be the market value of it in Boston at the time of the loss, less freight, duties, and charges for lading; or, whether it should be only the actual cost of the cargo when on board of the vessel at the port of shipment (including expense of lading), which may be regarded as its market value when on board, at such port, *without any addition for any increase in the market value* of like cargo at such port, occurring prior to the time of the loss; or whether it should be what the report allows, namely, the actual cost when on board of the vessel, at the port of shipment (including expense of lading), with the addition of the increase in the market value of like cargo at such port occurring prior to the time of the loss. * * *

All these considerations lead to the conclusion that profits, on the supposition of the prosperous termination of the voyage, ought not, in any case, to constitute an item of damage."

And again in *The Aleppo*, 1 Fed. Cases No. 158, at pages 345 to 347, it is said:

"The libellants, in supporting their exception, contend that the proper measure of damages is the market value of the wool in Boston, on the day of its loss, less duties, freight and charges for landing, and less also (an item not referred to in their exception, or before the commissioner) the reasonable cost of insuring the cargo from the place of loss to Boston. They insist that this would give the value of the cargo at the time and place of its destination, and would be in accordance with the rule laid down in *Smith* v. *Condry* (1 How. (42 U. S.) 28). But this construction of the rule would fritter it away altogether. * * *

It is contended by the libellants, that *Smith* v. *Condry* (*supra*), is overruled by *Williamson* v. *Barrett* (*supra*), if the former case is to be considered as laying down the rule, that *increased values* or expected profits or earnings can never be allowed as damages in collision cases. It is sufficient to say, that the supreme court, and the judges who concurred in the opinion of the court in the latter case, have never regarded the latter case as overruling the former. Mr. Justice Nelson, who delivered the opinion of the court in the latter case, cites the former case, in *The Ocean Queen* (*supra*), as settling the rule which is to govern on like questions in all cases of marine torts. In the case of *The Vaughan* and *The Telegraph* (*supra*), the su-

preme court sanction the rule which in the same case, I had, on the authority of *Smith* v. *Condry* (*supra*), adopted; and in the very next case in the same volume (*The Cayuga,* 14 Wall. (81 U. S.) 270), the same court maintains the doctrine of *Williamson* v. *Barrett* (*supra*), that reasonable demurrage, for unavoidable detention while repairing an injured vessel, is a proper charge in all suits for damages by collision. * * *

It is equally impossible to sustain the rule of damages adopted by the commissioner. The general *increase in market* value, between the time of shipment and the time of the collision, was claimed and disallowed by the circuit court for this district, in the case of *The Ocean Queen* (*supra*). I should feel bound by that decision, so long as it was not overruled, even if I did not concur in its propriety. But it seems to me a correct decision. No principle of *restitutio in integrum,* or of putting the suffering party as nearly as possible in the same situation in which he would have been if no collision had taken place, or of giving him the actual damage sustained by him at the time and place of the injury, or of giving him indemnity to the extent of the loss sustained—as the general rule is thus variously expressed—requires or admits an allowance made on the principle adopted by the commissioner in this case. * * * It had, however, no further value to them, at that place, and their actual loss was nothing more than such money, with interest. Restoring to them that money, with interest, restores all they actually lost. *All beyond that was expected profits.* The wool was not in Montevideo, so as to have applied to it *any increase in market value, after it left there,* which might have applied to it if it had remained

there and been sold. *The increase in value after it left there, and while it was on the voyage based on an increase in the value there of like wool is as much contingent as an increase in its value* based on a price of like wool in Boston, at the time of the loss, higher than the price paid in Montevideo. The value of the wool to these libellants at the time and place of the loss, was only what it cost them to buy it and convey it to the place of loss, with interest. So, too, they cannot be allowed for any increase in market value at Montevideo or other place of purchase or shipment, between the time of purchase and the time of shipment. The rule is one which must operate uniformly in all cases."

See also *The Old Reliable,* 262 Fed. 108, 110 (C. C. A. 4) and *Guibert* v. *British Ship George Bell,* 3 Fed. 581, 584-585.

We have quoted at length from these authorities, to make it clear that in a collision case an increased value, such as the petitioner insured, is excluded from the recovery, because of its conjectural nature.

As we shall show later in discussing the case of *Canada Sugar Refining Co.* v. *Insurance Co.,* 175 U. S. 609, and *Strass* v. *Spillers,* Law Reports (1911), 2 King's Bench Div. 759, profit or increased value policies have come into use for the purpose of permitting a merchant to insure his profits. Hamilton, *J.* (now Lord Sumner), said, in *Strass* v. *Spillers, supra,* this is a common form of insurance. It is, as Hamilton, *J.*, said, a form of insurance ancillary to the trade in grain, for the purpose of protecting the assured in respect of a loss of increased value, or profits. But, to say as petitioner does in its brief, that an increased value cover is

an insurance on cargo, as if both policies were unvalued, is a misconception of the fundamental principles of insurance. If the agreed value in respondent's policy is to be disregarded, then both policies must be treated as unvalued, and then the assured's right of recovery must be limited to actual value at time and place of shipment—*Smith* v. *Condry, supra*; Phillips on Insurance, § 1229; Arnould on Marine Insurance (11th ed.), Section 365.

The parties are placed in a position where there are insufficient funds to pay them both, because the assured and the petitioner had agreed upon an arbitrary value as the value of the "increased value" insured by petitioner. Such value is in excess of the value at point of shipment, the measure of loss but for that agreement as to value. Both Courts below held that the assured could only subrogate the insurer in respect of rights which the assured had. This is the well established equity rule.

In *Phoenix Insurance Company* v. *Erie and Western Transportation Company,* 117 U. S. 312, at page 320, this Court said:

> "When goods insured are totally lost, actually or constructively, by perils insured against, the insurer, upon payment of the loss, doubtless becomes subrogated to all the assured's rights of action against third persons who have caused or are responsible for the loss. No express stipulation in the policy of insurance, or abandonment by the assured, is necessary to perfect the title of the insurer. From the very nature of the contract of insurance as a contract of indemnity, the insurer, when he has paid to the assured the amount of the indemnity agreed on between them,

> is entitled, by way of salvage, to the benefit of anything that may be received, either from the remnants of the goods, or from damages paid by third persons for the same loss. But the insurer stands in no relation of contract or of privity with such persons. *His title arises out of the contract of insurance, and is derived from the assured alone, and can only be enforced in the right of the latter.*" (Italics ours.)

The subject matter of insurance here effected by the petitioner was the "increased value". It was so specified in the petitioner's policy. The policy provided that it was to cover "increased value" on grain, and that such increased value was to be arrived at by taking the difference between the C. I. F. invoice cost and the highest market value per bushel, plus 5 cents, as set out in The New York Journal of Commerce, at the port of final delivery. The assured, in making their declaration, which was accepted by the petitioner, stated the Montreal price as the market value contemplated in the contract. This declaration was accepted and the loss was subsequently adjusted on the declaration so made. The subject matter of the petitioner's insurance, therefore, was the difference between the C. I. F. price and the highest Montreal price during a period of ten days after shipment.

Such a subject matter of the insurance was identical with that described in *Canada Sugar Refining Co.* v. *Insurance Co.*, 175 U. S. 609, at page 625, where such an interest was under discussion by this Court. This Court quoted with approval the following language from Phillips on Insurance:

> "The profit, then, which is the subject of a

> policy upon this interest is the excess of the value of the subject at the port of destination over its value at the shipping port."

In *Thames & Mersey Marine Insurance Co.* v. *British & Chilean S. S. Co.* (1916) 1 K. B. 30, 13 Asp. Mar. Cas. 221, Scrutton, *J.*, now one of the Lord Justices of the Court of Appeal and one of the most eminent English authorities on the law of insurance, held that an underwriter was only entitled to subrogation TO THE EXTENT TO WHICH ~~IT~~ HAS PAID IN RESPECT OF THE SUBJECT MATTER INSURED.

To recapitulate:

The declaration (Exhibit F at p. 60 of the Record) and the debit note (Exhibit G at p. 60 of the Record), on which the appellant computed and paid the loss under its policy, show that what it insured was the value on October 27th, the day of highest quotation during ten days after shipment, not of this cargo of wheat which was on that date at Fort William, but of a similar quantity of wheat on that date at Montreal.

> "Insured value under our Assured's Open Policy will be figured on the basis of the highest C. I. F. Montreal quotation during the ten days from October 27th, to which, of course, is added 5c, as provided for in the policy" (R. 60).
>
> "Highest market value on October 27, $1.64¾ per bushel, plus 5c—$1.69¾" (R. 61).

On that same date, October 27th, the value of this cargo on the "Glenorchy", which was then at Fort William, was only $1.54¾ per bushel, and that is all that

was recovered in the collision suit (R. 10). The difference between the value $1.54¾ per bushel—of this cargo on the "Glenorchy" as it existed at Fort William on October 27th, and the value of a hypothetical similar quantity of wheat at Montreal on the same date—$1.64¾—is ten cents per bushel. This difference was not recovered in the collision suit and is the difference or increase in value which the appellant insured. It is obvious that the increased value which the appellant insured was the anticipated profit which appellant's assured expected to derive if the cargo actually arrived at Montreal. But it is just this element of anticipated profit which would not be insured except for the agreement which appellant made as to value, and which is not recoverable in a collision suit and which was not recovered here.

This Court held long ago that a cargo owner could establish a total loss under a policy on profits by merely showing that the cargo did not in fact arrive at destination without showing that the cargo or any part of it was lost. *Patapsco Ins. Co.* v. *Coulter,* 3 Peters (U. S.) 222.

POINT II.

The subject matter of petitioner's policy, was not goods or merchandise, but "increased value" based on excess of Montreal quotation or market price over c. i. f. Montreal price,—that is, profits hoped to be realized if the grain should ever reach Montreal,—and as nothing has been recovered by the assured in respect of increased value, there is nothing to which the assured is subrogated.

In the British Marine Insurance Act, 1906, Section 16 (Act of Parliament, Dec. 21, 1906, 6 Edw. VII, ch. 41), it is provided:

> "Subject to any express provision or valuation in the policy, the insurable value of the subject-matter insured must be ascertained as follows: * * *
>
> (3) In insurance on goods or merchandise, the insurable value is the prime cost of the property insured, plus the expenses of and incidental to shipping and the charges of insurance upon the whole: (See *Usher* v. *Noble* (1810), 12 East, 639, 646; *Tuite* v. *Royal Exchange Co.* (1747), 1 Park 224, 225; 1 Marshall on Insurance, 232; Stevens on Average, 178 *et seq.;* Benecke, Pr. of Indem., 12-14; 2 Phillips on Insurance, s. 1232.)
>
> (4) In insurance on any other subject-matter, the insurable value is the amount at the risk of the assured when the policy attaches, plus the charges of insurance."

In Sea Insurance by William Gow, London, 1914, page V, it is said:

> "The object of the introducers of that Act [the British Marine Insurance Act, 1906] was

> to reproduce as exactly as possible the law as it then existed without making any attempt to amend it. Consequently, the Act, except in one or two minor particulars, gives in a systematic form the results of all important decisions rendered by English courts in matters of Marine Insurance."

See also Arnould on Marine Insurance, Eleventh Edition, Section 365 (quoted *supra*, p. 10).

It is clear from the definition contained in the statute, which is a codification of the English Law of Marine Insurance, that the subject matter of the respondent's insurance, being an insurance on 100 per cent. of the grain (R. 54), and being valued at the prime cost of the grain, was goods or merchandise. It is equally clear that the subject matter of petitioner's insurance was not goods or merchandise, but was another subject matter (R. 25).

In the recent case of *Loders* v. *Bank of New Zealand*, 45 Times Law Reports 203; 33 Lloyd's List Law Reports 70 (King's Bench Division) decided January 25, 1929, the Court held that a policy on "increased value of copra" (p. 71) was not a policy on the copra itself, and, therefore, was not a sufficient tender of a cargo policy under a C. I. F. contract. The policy in that case described the subject matter insured as follows:

> "On freight payable at destination valued at £325 being INCREASED VALUE OF COPRA through payment of freight or from such time as freight becomes due at destination. THIS INSURANCE BEING DEEMED TO BE PART OF THE TOTAL AMOUNT INSURED ON THE COPRA VALUED AT SUCH TOTAL AMOUNT" (p. 71).

Mr. Justice Wright, delivering judgment, held this was a policy merely

> "on the increased value of the goods insured consequent on the payment of the freight at destination. It is clear, therefore, that instead of insuring the goods under this policy simply at a valuation of £27 5s. plus 5 per cent. the insurance has been effected in this way which I have indicated, that is to say, it is on the goods valued at £27 5s. less £3 5s. as in respect of freight and plus 5 per cent. on that valuation. Then the freight, as I have said is a separate amount.
>
> Now the buyers objected to that policy and the matter came before the arbitration tribunal. What the buyers said when the policy was tendered when they were objecting to it was this: 'The contract clearly states that the copra is to be insured for the contract price plus 5 per cent. It was not so insured, * * *.' Surely sellers cannot seriously suggest that the London Copra Association, had it intended to provide for insurance for invoice price plus 5 per cent. and in addition the amount of the freight as increased value, such increased value to attach as an additional insurance upon the goods from the time the freight became due, would have used the wording it does use of 'contract price plus 5 per cent.'" (p. 74).

Mr. Justice Wright further said at page 75:

> "The contract, to my mind, is absolutely clear. It provides for insurance at a contract price plus 5 per cent. on the net shipping weight, and the contract price, as I have already said, for the reason which I have already stated, in this con-

tract means £27 5s., and therefore the policies ought to have been simply policies on the goods valued at £27 5s. per ton. The arbitrators, in my judgment, were right, both in fact and in law, in holding that the policies in question were not a good tender under the contract in this case."

In *Strass* v. *Spillers*, Law Reports (1911), 2 King's Bench Division 759, the Court held that a policy taken out by the shipper on "increased value" of a cargo of wheat was not a policy on the cargo itself and therefore that the shipper need not deliver that policy to the buyer under a C. I. F. contract with the cargo policies and was himself entitled to retain permanently any money collected under the increased value policy in case the cargo should not reach destination, notwithstanding the loss occurred after the shipper had sold the goods to the buyer. This decision is squarely in point to the effect that the subject matter of a policy on increased value of cargo is not cargo. The syllabus in that case reads as follows (1911) 2 King's Bench Division, at page 759:

> "The defendants bought a cargo of wheat at a price to cover cost, freight and insurance under a contract which contained the clause 'Seller to give policies of insurance (free of war risk) for 2 per cent. over the invoice amount, and any amount over this to be for seller's account in case of total loss only.' In order to fulfill the contract the seller bought a cargo of wheat from a person to whom the plaintiff had sold it, the contracts throughout being in the same form and containing the above clause. The plaintiff handed over to the buyer from him a policy for 2 per cent. over the invoice amount, and this policy was handed

over to the defendants in due course. The plaintiff, before selling the cargo, had taken out an honour policy on increased value of the wheat for his own benefit, which policy he retained in his own possession. A loss having occurred the underwriters paid the defendants the full amount under the policy which had been handed over to them. The plaintiff then sent the increased value policy to the defendants, requesting them to collect from the underwriters the amount payable thereunder. The defendants did so, and upon being paid the amount by the underwriters they claimed to retain it upon the ground that under the contract of sale the plaintiff was bound to hand over all policies effected on the wheat at the time when he entered into the contract of sale. In an action by the plaintiff to recover the amount as money had and received to his use;

Held, that, as the increased value policy was an independent honour policy effected by the plaintiff for his own benefit, the defendants were not entitled to it under the contract, and that the plaintiff was entitled to recover the amount received by the defendants thereunder as money had and received to his use."

The Court in that case held that if the policy on increased value of cargo had been tendered to the buyer as one of the policies under the C. I. F. contract it could properly have been rejected by the buyer on the ground that IT WAS NOT EXPRESSED TO BE UPON CARGO, BUT UPON INCREASED VALUE OF CARGO (at p. 768 of (1911) 2 K. B. D.). Referring to the increased value policy, the Court held that:

"It is to be observed that the policy is ex-

pressed to be ON INCREASED VALUE: to pay as cargo, showing that IT IS NOT IN THE ORDINARY SENSE A MERE INSURANCE ON CARGO. * * * It was a legitimate speculation, carried out by means of honour policies, in view of the rise in the market value of wheat, which might lead the plaintiff to desire to have further business protection than the other policies would give him. An experienced broker at Lloyd's was called, whose evidence was not in any way challenged, and he stated that this form of insurance is common, NOT AS A MODE OF INSURING CARGOES, BUT, AS I UNDERSTOOD HIM, AS ANCILLARY TO THE TRADE IN GRAIN" (pp. 768 and 769 of 1911, 2 K. B. D.).

And referring to the contention of the buyer in that case (the appellant in the present case), the Court said, at page 774 of 1911, 2 K. B. D.:

> "They must have appreciated from the terms of the policies that this was not the kind of policy which is tendered for payment by an ultimate receiver of the goods, but is such a policy as is tendered by persons who wish independently to insure the goods to protect themselves against the fluctuations of the market."

Mr. Justice Hamilton, delivering judgment in the *Strass* case, said (1911, 2 K. B. D. at pp. 767 and 768):

> "This is an action to recover two sums amounting together to £652 19s., which the defendants have received from the British and Foreign Marine Insurance Company and the London Assurance Corporation respectively on two policies effected by the plaintiff, called increased value policies. The plaintiff's claim is for damages for conversion, and alternatively for money had and received to

his use. The defendants in answer allege that they were entitled to receive the policies from the plaintiff, and that, having collected the moneys due upon the policies, they are entitled to retain them for their own benefit.

The claim arises out of a contract for the sale of a cargo of Australian wheat. On December 30, 1908, the defendants, through Harris Brothers, a firm of brokers, bought from Messrs. Dewar & Webb a cargo to arrive which was to be shipped under bills of lading to be dated January and/or February, 1909. Ultimately the cargo which was declared to them was that by the sailing vessel 'Leon Bureau'. There had been other dealings with the cargo before it reached British waters, and in particular by a contract in similar form, dated March 16, 1909, Messrs. Allatini had bought the cargo from the plaintiff, and they by a contract in similar form of the same date sold the same cargo to Messrs. Dewar & Webb, who thereby fulfilled their contract of December 30, 1908, with the defendants. The vessel, bound for a Bristol Channel port, went ashore on the coast of Cornwall and sustained considerable damage, but there was ultimately such salvage that the claim in respect of the cargo was only for particular and general average. The adjustment in respect of the loss was made on August 26, 1909, and on the following day the underwriters on the policies on cargo paid the losses. The policies, which were handed over by the plaintiff and which ultimately reached the defendants and were accepted by them as being the policies they had to receive under the contract, did not include two policies on increased value, namely, one for £2,000 dated February 9, 1909, and the other for £492 dated February 27, 1909, and after the loss

on the cargo had been adjusted the plaintiff made a claim upon these two policies. In them the voyage was expressed in terms which covered the voyage of the 'Leon Bureau', and they covered the contracts of sale. The subject-matter was '£2,000 —in the other policy £492—increased value on about 12,439 quarters wheat in 28,002 bags. To pay as cargo, but in case of general average to pay only the amount applying to the excess of contributory value over the other insurances effected on the cargo itself; without benefit of salvage;' warranted free from average unless general or the ship be stranded. It is to be observed that the policy is expressed to be ON INCREASED VALUE; to pay as cargo, showing that IT IS NOT IN THE ORDINARY SENSE A MERE INSURANCE ON CARGO * * *."

In *Canada Sugar Refining Company* v. *Insurance Company of North America*, 175 U. S. at page 625, this Court quotes with approval the following passage from Phillips:

> "The profit, then, which is the subject of a policy upon this interest *is the excess of the value of the subject at the port of destination over its value at the shipping port.*"

The word "profits" means the difference between the actual cost and the selling price, *Cooke* v. *Cain*, 35 Wash. 353, 77 Pac. 682, 683.

The term "profits" has reference to the gain which a seller would have made if he had been permitted to complete his contract. *Gardner* v. *Deeds*, 116 Tenn. 128, 92 S. W. 518, 519, 4 L. R. A. (N. S.) 740, 7 Ann. Cas. 1172 (adopting definition in *Philadelphia Co.* v. *Howard*, 13 How. (54 U. S.) 307):

> "Earnings expended on a new structure may or

> may not be 'profits'. Whether they are or not depends on other things to be taken into the account besides the mere fact of such expenditures. *Grant* v. *Hartford Co.*, 93 U. S. 225, 228."

For definition of "profits" see *Mobile Co.* v. *Tennessee*, 153 U. S. 486, 14 Sup. Court 968, 971.

Similarly in the present case, the increased value insured by the petitioner, was in legal effect "profits", because it did not represent an actual value or expenditure or investment made. The increase in value could not occur until the wheat should arrive at Montreal and thus earn and bring into existence that value. The only conclusion to be derived from this state of facts is that reached by both Courts below, viz., that as there had been no recovery in respect of such increased value, there was nothing to which the petitioner could be subrogated in respect of such increase. This conclusion is fully supported by the parties' own interpretation of the contract. After the loss, the petitioner and the assured amended their contract of insurance, and stated that the policy had been altered from inception to cover shipments termed "increased value" only and not basic risks, and agreed that the petitioner should waive its right to participate in any salvage realized from the sale of damaged grain (R., 26). If the parties had intended that the insurance was in fact an insurance on grain, then they would not have inserted such a provision in their contract. The insertion of this provision shows that both the assured and the petitioner understood that the subject matter of the insurance was not goods or merchandise.

In an effort to sustain his position, counsel argues that the insurance in *Canada Sugar Refining Co.* v.

Insurance Company, supra, was not the same as that granted by the petitioner to its assured. In the *Canada Sugar Refining Company* case, the facts were that 2,462 tons of sugar were shipped from the Philippine Islands to Montreal, which were insured with the Atlantic Mutual Insurance Company for $166,145. Later, while the carrying vessel was on voyage, when the assured ascertained that the then value of the sugar was $181,000, it took out with the Insurance Company of North America, a policy on profits, valued at $15,000, thus making the insurance precisely the same in amount as the value at risk. The facts in that case in this respect are identical with the facts here, except that in the *Canada Sugar Refining* case the excess cover is called "profits", whereas here such excess cover is called "increased value". In the *Canada* case it does not appear that the Atlantic Mutual valuation constituted the prime cost, but it does appear that the actual value of the sugar at the time when the policy on profits was taken out, was the aggregate of the two sets of insurances. This Court held in that case that the profits insurance was in fact an insurance on profits and not cargo, although it appeared there that the value of the sugar was equal to the aggregate of the two insurances (p. 611 of 175 U. S.).

This Court then quoted from Phillips on Insurance, as follows:

> "Under a policy on the profits of a cargo on a voyage from Philadelphia to the Mediterranean, and thence to South America, valued at $20,000, the ship and cargo were destroyed by fire at Gibralter. It was held (*Patapsco Ins. Co.* v. *Coulter,* 3 Pet. 222) that the assured was entitled to recover the whole amount of the valuation against the underwriters, without proving that there would have been any ultimate profit on the voyage, if it had been pursued without interruption

or disaster. And this is the prevalent doctrine in the United States. * * * *The profit, then, which is the subject of a policy upon this interest, is the excess of the value of the subject at the port of destination over its value at the shipping port.* It is only in case of loss that the policy is of any avail to the assured, and he wishes that it may avail him in a total as well as partial loss. In the latter case, the loss may be adjusted, under an open policy, on the English doctrine, by ascertaining how much less the profit is than it would have been if the goods had arrived sound.

But in the case of a total loss by the ship never arriving, it is very difficult to say what the profits would have been had the ship arrived, since it is not possible to determine when she would have arrived; and if this difficulty is got over by assuming some probable time, there must often be a long delay in hearing from a distant port of destination, and learning the state of markets. The prompt return of his capital to the assured in case of loss, which is a very important consideration in insuring, requires a valuation of the profits, in preference to an open policy subject to an adjustment upon the English doctrine of determining the amount by the state of the market at the port of destination. The same difficulty does not arise in case of a loss on goods, which is adjusted on the invoice value. There does not appear to be any way of avoiding this difficulty but by a valuation, and this is felt in practice, since policies on profits are usually valued" (pp. 624, 625 of 175 U. S.).

This passage from Phillips, quoted with approval by this Court, entirely disposes of the greater part of petitioner's argument to the effect that because there was

an actual value at destination any insurance on that value makes the insurance an insurance on cargo.

The "increased value" here insured was, therefore, in every sense, a profit in so far as it related to any value in excess of the value at the port of shipment. The subject matter of petitioner's policy was, therefore, profits, and not cargo. And as petitioner can only be subrogated to losses in respect of the subject matter insured, it can under no circumstances claim anything in respect of the lost profits, as no profits were recovered by the assured. *Thames & Mersey Marine Insurance Co.* v. *British & Chilean S. S. Co.* (*supra*).

POINT III.

Brown v. _Merchants Marine Insurance Co., Ltd._, 152 Fed. 411, relied upon by petitioner, is not in point.

The facts in *Brown* v. *Merchants Marine Insurance Co., Ltd.*, 152 Fed. 411, discussed at length by the petitioner are wholly different from those in the present case. It deals with hull insurance and not cargo insurance, and as there is a different method of ascertaining the value of cargo from that of hull for insurance purposes what was recently said by this Court in *Gulf Refining Co.* v. *Atlantic Mutual Insurance Co.*, 279 U. S. 708, is applicable here.

There this Court said:

> "The other American cases have dealt with insurance on hulls and so are not decisive."

Moreover, in the *Brown* case, the actual value of the

vessel insured was $140,000 (152 Fed. at p. 412) which exceeded by $48,000 the whole of the insurance there involved (which, as appears from page 31 of petitioner's brief, was only $92,000). Here the contrary is the fact: the actual value (the value at time and place of shipment) was $309,500 (R. 44), which was *LESS* by $37,000 than the aggregate of the insurance, $346,500 (R. 42-44). *The question presented here, therefore, never arose in the Brown case.* Here the question is whether two insurers, one insuring a basic risk at a value within the insurable value of the cargo, and the other insuring increased value beyond the insurable value of the cargo, should share pro rata in a fund which represents only actual value at time and place of shipment, that is, cargo's insurable value, and which is insufficient to pay them both, because one of the underwriters, the petitioner here, has elected to insure increased value in an amount beyond the insurable value. In the *Brown* case the question involved was whether a fund insufficient to pay both, not by reason of insufficiency of value of the subject matter of insurance, but because the sum recovered had been reduced because the vessel insured was also at fault for the collision, should be distributed pro rata or otherwise.

Aside from the foregoing, it may be doubted whether the decision in the *Brown* case was correct. From an examination of the opinion it appears that the Court awarded to the underwriters the whole of the recovery. It will be noted from page 31 of petitioner's brief, that the assured was a co-insurer to the extent of $48,000. There is nothing in the opinion to indicate why the Court did not award to the assured any part of the recovery. If the conclusion reached by the Court is correct, it would seem that the owner was clearly entitled to a part of the recovery. If the valuation in the disburse-

ment or increased value policies placed such underwriters in a preferential position vis-a-vis the assured, it would seem that the valuation in the hull insurance, the basic risk, would place such underwriters in a preferential position vis-a-vis the disbursement underwriters. For as regards the hull underwriters, the disbursement underwriters stand in the position of reinsurers of their coinsurer the original assured.

Moreover the conclusion in the *Brown* case to the effect that the hull underwriters were not entitled to the whole of the recovery and must share with disbursement underwriters, is impossible to reconcile with what was said by this Court in the case of *Mobile, etc. Railway Co.* v. *Jurey,* 111 U. S. 584, at pages 594 and 595:

> "Insurers of a ship which has been run down and sunk by the fault of another ship, are, upon their payment of a total loss, subrogated to the right of the insured to recover therefor against the owners of the latter vessel, *and if their policy was a valued one, their payment of this value will give them the whole spes recuperandi,* and the right to the whole damages, *though the insured vessel was, in fact, worth a larger sum than the valuation named in the policy. North of England Ins. Association* v. *Armstrong,* L. R. 5. Q. B. 244. See, also, *Clark* v. *Wilson,* 103 Mass. 219, 227." (Italics ours.)

No mention is made in the opinion in the *Brown* case of this Court's decision in *Mobile* v. *Jurey, supra.*

In the *Brown* case the hull underwriters did pay a total loss on the whole of the vessel insured. Their policies were valued policies and following what this Court said in *Mobile, etc. Railway Co.* v. *Jurey,* they were

entitled to the whole of the fund recovered. As a disbursement underwriter insures an interest other than the hull insured by the primary underwriters, he cannot stand in any better position than the assured in reference to such underwriters.

The case of the *Federal Insurance Company* v. *Detroit Insurance Company*, 202 Fed. 648, referred to on pages 27 and 32 of petitioner's brief, clearly has no application here. In that case there was no increased value insurance, nor was there any disbursements insurance. The policies involved were all hull policies on the "Etruria", and the controversy arose because some of the underwriters on the "Etruria" also had policies on the colliding vessel, the "Stone". These underwriters were opposed to suing the "Stone" because they would lose more if the "Stone" were held solely at fault than if no suit were brought. The other underwriters, who had covered the remainder of the single agreed total valuation in the hull policy on the "Etruria", insisted that the "Stone" be sued. After a recovery was effected on the basis of both vessels being at fault, the underwriters who had brought suit wished to preclude the underwriters who had objected to the suit from participating in the recovery. The Court held that they could not be denied a share in the recovery. The significant fact is that all the underwriters thus permitted to participate in the recovery were hull underwriters and had issued precisely the same form of policy and each had insured a certain fraction of the same agreed valuation.

The only cargo underwriters in the case were treated on an entirely separate basis from the hull underwriters, and were permitted recovery in full (and not proportionately) on the theory that cargo was innocent of

fault. The freight underwriters were also treated independently of cargo and in accordance with ordinary practice were made to share proportionately with the hull underwriters and the crew. There is no freight insurance or crew claim involved in the present case. The quotation, therefore, appearing on page 34 of petitioner's brief, suggesting that there was some apportionment between freight underwriters as such and hull underwriters, is misleading. The question involved here never arose in that case.

In *North of England Ins. Association* v. *Armstrong*, L. R. 5 Q. B. 244, there was a policy of insurance effected for £6,000 on the ship "Hetton", valued at £6,000. The "Hetton" was run down and sunk by the steamship "Uhlenhorst". The underwriters on the "Hetton" paid a total loss of £6,000. Later suit was brought by the owners of the "Hetton" against the "Uhlenhorst", and a recovery of £5,000 was effected. The actual value of the "Hetton" was £9,000. The Court held that the underwriters were entitled to the full £5,000 recovered, because the assured had agreed with the underwriters that the value of the property was £6,000. It follows that in the *Brown* case if the same rule had been applied the hull underwriters having agreed that the value of the ship insured was $75,000, would have been entitled to the whole of the sum recovered from the colliding vessel as the sum recovered was less than $75,000.

Some remarks (obiter) of Cockburn, *C. J.*, in that case have been criticised. See Arnould on Marine Insurance, Section 1230; *The Livingstone*, 130 Fed. 746. Arnould suggests that there was a failure on the part of the Court to understand the distinction between an abandon-

ment and a subrogation. Arnould, however, entirely approved the decision in the *Armstrong* case on the point at issue:

> "This decision is, no doubt, quite correct. The underwriters did not, in fact, recover from the 'Uhlenhorst' a sum exceeding what they had paid under their contract of insurance. Nor was the sum so recovered to any degree enhanced by the fact that the 'Hetton' was, in reality, worth more than she was valued at in the policy. Further, on the well-established principle that the policy valuation is binding in all questions as to the amount recoverable thereon from underwriters, it is clear that if the owners of the 'Hetton' had in the first instance sued the 'Uhlenhorst' and recovered 5,700£, and afterwards sued their own underwriters for 6,000£, they would have been obliged to give credit for the 5,700£ obtained from the 'Uhlenhorst'" (p. 1580, Section 1229).

Arnould's reasoning has since the publication of the last edition of Arnould (1924) been followed in *Goole* v. *Ocean Marine Insurance Co.*, L. R. (1928) 1 K. B. D, 589. In that case a ship was insured at an agreed value of £4,000. In collision she was damaged, and the cost of repairing her was £5,000. Her owners recovered £2,500 from the other ship, the recovery being reduced because both vessels were to blame. Later the owners claimed £2,500 from their underwriters. The underwriters contended that as the limit of their liability was £4,000, and as £2,500 had already been paid by the tort feasor, the amount due from them should not exceed £1,500. The Court sustained this contention of the underwriters, on the authority of *North of England Insurance Association*

v. *Armstrong, supra,* and *Thames & Mersey Marine Insurance Co.* v. *British & Chilean S. S. Co.* (1915), 2 K. B. 214.

It follows from these English authorities that if the *Brown* case had arisen in England the basic or primary underwriters would have been entitled to the whole recovery, because the recovery was less than the amount they had insured. To hold otherwise is to place an underwriter insuring an interest other than a basic risk in a better position relative to the basic risks underwriter than the assured would be if there had been no such underwriters. No good reason can be assigned for treating such underwriters preferentially to an insured.

In *Queens Insurance Company* v. *Globe & Rutgers Fire Insurance Co.*, 263 U. S. 487, 493, this Court said:

> "There are special reasons for keeping in harmony with the marine insurance laws of England, the great field of this business."

See also *Gulf Refining Co.* v. *Atlantic Mutual Marine Insurance Co.*, 279 U. S. 708, 715. We submit, therefore, that as the decision in the *Brown* case is contrary to the English authorities it should not be followed in any event. This Court in *Mobile, etc., Railway Co.* v. *Jurey*, cited the *Armstrong* case with approval. So in asking this Court to disapprove the *Brown* case we are merely requesting the Court to reaffirm what it has already said in *Mobile, etc. Ry. Co.* v. *Jurey*. But, as we have pointed out, the *Brown* case is clearly inapplicable here in any event, because the question presented by this case never arose in the *Brown* case. In the *Brown* case, all of the agreed insured values involved were less than the actual value and the value upon which the recovery was based. Here the contrary is the fact.

POINT IV.

There was no double insurance because the American Rule was incorporated by special provision in both the policy issued by the petitioner and that issued by the respondent. Under the American Rule, the petitioner's policy being subsequent in time, did not attach as to any insurance effected on the grain by the respondent, and as there could be no contribution in the loss, there can be no contribution in the recovery.

The respondent's insurance was effected before the grain became the property of Dreyfus & Company, and the petitioner's policy did not attach until the grain became the property of the Dreyfus Company (R. 42). Hence, it is obvious that the insurance of the respondent was prior in date to that of the petitioner. The petitioner's policy provides:

> "Provided always, and it is hereby further agreed, that if the said insured shall have made any other insurance upon the property aforesaid, prior in date to this policy, then this Company shall be answerable only for so much as the amount of such prior insurance may be deficient towards fully covering the property hereby insured; and this Company shall return the premium upon so much of the sum by them insured as they shall be by such prior insurance exonerated from. And in case of any insurance upon the said property, subsequent in date to this Policy, this Company shall nevertheless be answerable for the full extent of the sum by them subscribed hereto, without the right to claim contribution from such

subsequent insurers, and shall accordingly be entitled to retain the premium by them received, in the same manner as if no subsequent insurance had been made" (R. 22).

The respondent's policy provides:

"PROVIDED ALWAYS, and it is hereby further agreed, that if the said Insured shall have made any other insurance upon the goods aforesaid, prior in day of date to this Policy, then the said Assurers shall be answerable only for so much as the amount of such prior insurance may be deficient towards fully recovering the goods hereby insured; and the said Assurers shall return the premium upon so much of the sum by them insured, as they shall be by such prior insurance exonerated from. And in case of any insurance upon the said goods subsequent in date to this Policy, the said Assurers shall nevertheless be answerable for the full extent of the sum by them insured, without right to claim contribution from such subsequent insurers, and shall accordingly be entitled to retain the premium by them received, in the same manner as if no such subsequent insurance had been made. Other insurance upon the goods aforesaid, of date the same day as this Policy, shall be deemed simultaneous herewith; and the said Assurers shall not be liable for more than a ratable contribution in the proportion of the sum by them insured to the aggregate of such simultaneous insurance" (R. 47, 48).

In Winter on Marine Insurance, New York, 1919, pages 163 and 164, it is said:

"DOUBLE INSURANCE.—The next section of the printed form deals with the subject of prior, simul-

taneous and subsequent insurance. Herein is found one of the principal differences between American and British insurance practice. The clause in question reads:

'Provided always, and it is hereby further agreed, that if the said assured shall have made any other assurance upon the premises aforesaid prior in day of date to this policy, then the said * * * Insurance Company shall be answerable only for so much of the amount of such prior insurance as may be deficient toward fully covering the premises hereby assured; and the said * * * Insurance Company shall return the premium upon so much of the sum by them assured, as they shall be by such prior assurance exonerated from. And in case of any insurance upon the said premises, subsequent in day of date to this policy, the said * * * Insurance Company shall nevertheless be answerable for the full extent of the sum by them subscribed hereto, without right to claim contribution from such subsequent assurers, and shall accordingly be entitled to retain the premium by them received, in the same manner as if no such subsequent assurance had been made. Other insurance upon the premises aforesaid, of date the same day as this policy, shall be deemed simultaneous herewith; and the said * * * Insurance Company shall not be liable for more than a ratable contribution in the proportion of the sum by them insured to the aggregate of such simultaneous insurance.'

Little need be said in explanation of this portion of the policy. The American theory of double insurance as herein set forth is that if insurance has been effected prior in day of date to the

policy in question the underwriter shall be relieved of all liability for loss except in so far as the prior policy is deficient in amount, not fully protecting the property insured. The insurance company agrees to return premium on so much of the amount as is over-insurance.

If there are two or more policies on the same property and aggregating in amount more than the insured value of it, simultaneous in day of date, then the various underwriters become co-insurers, each agreeing to be responsible for his *pro rata* proportion of the loss and each retaining his *pro rata* share of the premium. If the policy in question, however, is prior in date to any other policy then the underwriter agrees to assume full responsibility for loss to the amount of his policy, and is entitled to retain the full premium charged.

THEORY OF DOUBLE INSURANCE DIFFERENT IN GREAT BRITAIN.—*This principle of double insurance* is quite different *from the practice in Great Britain* where the priority of the date of a policy has no control over its validity. An assured may be very much over-insured, in fact after having placed the risk in full with one underwriter, he may again insure it with a second underwriter, each of whom is liable in the event of loss for the entire amount of his policy. The assured, however, cannot collect his loss twice and the two underwriters stand in the position of sureties one for the other, he from whom the loss has been collected having a valid claim upon the other underwriter for a ratable contribution to the loss. The English doctrine is set forth in the following words in Section 80 of the Marine Insurance Act:

80. (1) Where the assured is over-insured by

> double insurance, each insurer is bound, as between himself and the other insurers, to contribute ratably to the loss in proportion to the amount for which he is liable under his contract.
>
> (2) If any insurer pays more than his proportion of the loss, he is entitled to maintain an action for contribution against the other insurers, and is entitled to the like remedies as a surety who has paid more than his proportion of the debt'."

The parties, therefore, by their own agreements, have clearly provided that the subject-matter of the two insurances was not the same. One is insurance on cargo and the other is insurance on increased value or profits. The fact that the petitioner and its assured got over the difficulty mentioned by Phillips in the passage which we quoted from the *Canada Sugar Refining* case (pp. 29-31 *supra*), by agreeing upon a valuation of the "Increased Value" in excess of the cost and in excess of the value of the grain at time and place of shipment, does not make the two insurances risks on the same subject matter. Yet respondent's argument must go that far to succeed. For, if the subject matter of the two insurances had been the same, then there was double insurance, and there should have been contribution. But there never was a suggestion of contribution, when the loss was paid, nor could there be; how then, can there be contribution in the recovery?

If the insurances were on the same interest, and if in fact there was a real case of double insurance, there might be some justification for appellant's argument. The respondent's policy, however, is an ordinary cargo policy, and the petitioner's policy is, as stated on its face,

a policy on "Increased Value". The policies, therefore, do not cover the same interest. Irrespective of whether the petitioner's policy is strictly speculative, the evident fact is that the increased value insured does not come into existence except with respect to an arbitrary value which has no relation to time and place of shipment; a value as to time subject to an option of the assured to select any time during period of ten days after shipment; a value as to place based upon Montreal quotations. But as the fund in court does not include an increased value based upon any such criteria, such increase cannot be taken into consideration in dividing the fund in court.

The following authorities define double insurance:

"Double insurance" or "co-insurance" occurs when several policies are effected for the benefit of the same person on the same subject-matter, while "re-insurance" is effected by the insurer for his own protection. *Ocean S. S. Co.* v. *Aetna Ins. Co.*, 121 Fed. 882, 887.

The term "double insurance" means an insurance of the same interest, and is entirely different from "re-insurance", which is a contract of indemnity to the person reinsured for the whole loss sustained in respect to the subject of the insurance to the extent to which he is reinsured. *Providence Washington Co.* v. *Atlanta Co.*, 166 Fed. 548, 553.

Double insurance which makes a proper case for contribution between the several insurers, is where the property insured and the interest insured is identical. *Royster* v. *Roanoke Co.*, 26 Fed. 492, 494.

A double insurance exists when the same person is insured by several insurers separately in respect to

the same subject and insurance. *Lowell* v. *Safeguard Fire Ins. Co.*, 88 N. Y. 591, 597.

A double insurance is where an assured is to receive two sums, instead of one, or the same sum twice over, for the same loss, by reason of his having made two insurances upon the same ship or goods. *Thurston* v. *Koch*, 4 Dallas (4 U. S.) 348, 350.

But two insurances on the same ship, not for the same entire risk, do not constitute double insurance. Thus a policy "at and from Bayonne to the first port the ship might make in the United States" is not identical with another policy on the same ship "from Bayonne to New York". The first policy covers the time the vessel is at Bayonne, and terminates at the first port the ship might make in the United States, whether it be New York or some other port. Hence the two policies do not constitute double insurance. (*Columbian Ins. Co.* v. *Lynch*, 11 Johns. (N. Y. 233, 238, 239.)

CONCLUSION.

The decrees below should be affirmed, with interest and costs.

Respectfully submitted,

T. CATESBY JONES,
JAMES W. RYAN,
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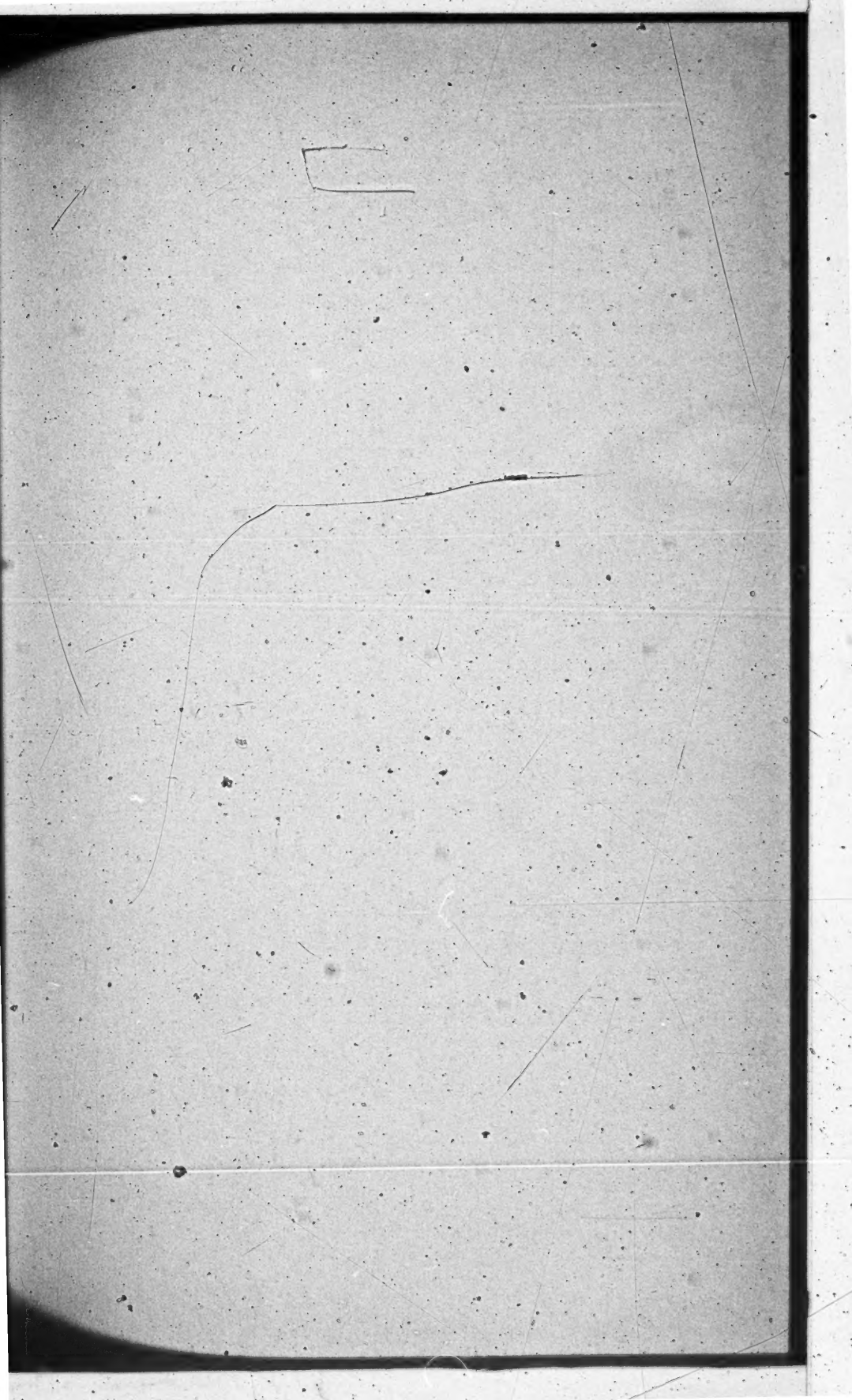

SUPREME COURT OF THE UNITED STATES.

No. 261.—October Term, 1930.

Standard Marine Insurance Company, Ltd., Petitioner, *vs.* Scottish Metropolitan Assurance Company, Ltd.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

[April 13, 1931.]

Mr. Justice Stone delivered the opinion of the Court.

Dreyfus & Co. purchased wheat at $1.38½ a bushel, C. I. F. Montreal. The wheat was shipped on the S. S. "Glenorchy" from Port Arthur to Montreal by the seller, who had insured it, with respondent, for buyer's account, at a valuation of $1.42 a bushel, the risk to begin immediately after the loading of the vessel. Dreyfus also effected insurance, with petitioner, covering "increased value" of the grain above its C. I. F. cost. That value was stipulated to be the difference between C. I. F. cost and the highest market value per bushel between the day of sailing and the day on which cargo would have arrived at destination if the loss had not occurred, plus 5¢. The applicable clause of the policy, so far as material, is printed in the margin.[1]

[1] "To cover 'Increased Value' on grain owned by the Assured or in which the Assured may have an interest, such 'Increased Value' for the purposes of this insurance, to be arrived at by taking the difference between the C. I. F. invoice cost and the highest market value per bushel, plus 5c. (Five cents), as set out in the 'New York Journal of Commerce' between the day of sailing of the vessel at point of shipment, and the day of the final delivery of the complete cargo at destination as named in the Certificates, both days inclusive; and in the event of casualty, to be valued at the difference between the C. I. F. invoice cost and the highest market value per bushel, plus 5c. (Five cents) as set out in the 'New York Journal of Commerce' between the day of sailing of the vessel at point of shipment, and the day the final delivery of the complete cargo would have arrived at destination if casualty had not occurred, both days inclusive. . . ."

A collision of the Glenorchy with the S. S. "Leonard B. Miller" resulted in a total loss of the cargo. In a proceeding for limitation of liability, brought by the owner of the Miller; in the District Court for Northern Ohio, both vessels were held at fault, and the cargo owner recovered $309,500 for the insured wheat, with interest from the date of collision. That was its value, at $1.54¾ a bushel, at the time and place of shipment, which is the value recoverable for loss of cargo by maritime tort. *The Vaughan & Telegraph*, 14 Wall. 258, 267, 268.

Respondent paid Dreyfus $284,000, the full amount of its policy. Petitioner paid $62,500, stipulated to be the amount due on its policy at the rate of 31¼¢ per bushel, the difference between $1.38½, the C. I. F. price, and $1.69¾, the highest market value within the ten days after departure required for the voyage, plus 5¢. Both insurers intervened in the limitation proceeding, each asserting its right to be subrogated to the cargo owner's right of recovery. The special commissioner to whom the matter was submitted reported that petitioner and respondent were co-insurers of cargo, and that they should share pro rata, in proportion to their policy liabilities, in the cargo owner's recovery, after payment of his expenses in litigating the claim.

The District Court decreed payment to respondent of $284,000, the full amount of its insurance liability, with interest from the date of loss, and payment to petitioner of the balance, after deducting the commissioner's fees. 28 F. (2d) 540. The Court of Appeals for the Sixth Circuit affirmed. 39 F. (2d) 436. Both courts thought that as the insurer, on payment of the loss, is subrogated only to such right of recovery as the insured had, *Phoenix Ins. Co.* v. *Erie & W. Trans. Co.*, 117 U. S. 312, and as the latter had no right to recover for any increase in value beyond that at the time and place of shipment, petitioner, so far as it had insured such an increase in value, was not entitled to participate in the recovery, since participation would amount to the assertion of a right of recovery which the insured did not possess.

This Court granted certiorari, 282 U. S. —, October 13, 1930, on a petition setting up, as grounds for the writ, the importance of the question and an alleged conflict between the decision below and that of the Court of Appeals for the Ninth Circuit in *Brown* v. *Merchants' Marine Insurance Co.*, 152 Fed. 411.

Co-insurers, on payment of the loss insured against, are subrogated to the right of the insured to recover from one who causes the loss, and participate pro rata in the recovery. As the policy liabilities of the present insurers were occasioned by the destruction of the same cargo by the same peril, and as the insured has recovered for its destruction by that peril, the question precisely stated is not whether petitioner may assert, by way of subrogation, a right of recovery which the insured did not possess, but the extent to which petitioner is entitled to be subrogated to the right which the insured did possess and assert against the colliding vessels. Hence the disposition of the present case turns upon the question whether petitioner and respondent were co-insurers against the same risk, or independent insurers against different risks.

We think it clear, and it seems to be conceded, that since respondent is an insurer against loss of cargo, petitioner, if its policy be regarded as insuring against loss of profits of the venture, is not a co-insurer with respondent, even though the liability of both accrued by reason of the destruction of the cargo by the same peril. The very purpose of insurance of profits is to protect the insured against risk of loss which is not covered by insurance upon the cargo itself. See *Canada Sugar Refining Co.* v. *Insurance Co. of North America*, 175 U. S. 609; *Patapsco Insurance Co.* v. *Coulter*, 3 Pet. 222; 1 Arnould on Marine Insurance (11th ed.) §§ 236, 287, 288; cf. *O'Brien* v. *North River Insurance Co.*, 212 Fed. 102.

When the insured thus separates and separately insures two distinct elements of risk—value of cargo and profits which may be earned on it—both insurers cannot share by subrogation in his right to recover against wrongdoers for cargo damage alone. For, while destruction of the cargo has in a sense occasioned both losses, the wrongdoer is liable for one and not the other; and hence there is no right of recovery by the insured for loss of profits to which the insurer against that loss may be subrogated. The object of subrogation is to make indemnity to the insured, up to the amount of the policy, the measure of the liability of the insurer, and that is its justification. But the liability would be less than such indemnity if the insurer could be subrogated to a right of recovery by the insured for a loss other than that insured against.

Petitioner insists that its insurance was not of anticipated profits,

but of increased value of the property, not differing from any other insurance on property, with respect to which the insurer when called upon to contribute to loss of its value becomes entitled to share pro rata with other insurers of the property in any recovery by the insured against third persons causing the loss. *Brown* v. *Merchants' Marine Insurance Co., supra.* But this argument leaves out of account the peculiar nature of insurance on increased value of cargo over its value at the port of departure which, for present purposes, is to be distinguished from insurance on hull or any other property, increase in value of which may be embraced in, and recovered under policies insuring against a loss of the property.

It has long been the accepted rule, in the law of maritime torts and of maritime insurance, that the recoverable value of cargo lost or damaged at sea is that at time and place of shipment, without allowance for increase of value or anticipated profits. *Smith* v. *Condry,* 1 How. 28, 35; *The Vaughan & Telegraph, supra,* pp. 267, 268; *The Scotland,* 105 U. S. 24, 35; *The Aleppo,* 1 Fed. Cases, No. 158; *The Umbria,* 59 Fed. 489, 490; Phillips on Insurance, §§ 1226, 1229; 1 Arnould on Marine Insurance (11th ed.) § 365; see *The Old Reliable,* 262 Fed. 108, 110; *Guibert* v. *The George Bell,* 3 Fed. 581, 584, 585. The cargo is placed at risk when the voyage begins. Its value then is the measure of the risk and of the loss suffered if the cargo is lost or damaged on the voyage. Market value at destination on the date of the loss is not the measure, for that was not its value at the place of loss. To attribute to the cargo the market value at destination is to measure, not the loss, but the profits which would have accrued if the voyage had been completed, and if the market price at the time of loss had continued to be the market price at the time of arrival.

Petitioner's policy describes the insurance as upon "increased value on grain". But so far as it covered the increase in value over that at the port of departure, it insured against a loss not covered by the insurance on cargo, or recoverable against tortfeasors causing cargo loss. See *Strass* v. *Spillers & Bakers,* [1911] 2 K. B. 759; British Marine Insurance Act, Dec. 21, 1906, 6 Edw. 7, c. 41, § 16, which is a codification of the common law. Gow, Sea Insurance, p. v. (Preface). The liability on the policy above

the value of cargo at Port Arthur represents profits, as valued, which it might reasonably be assumed would have accrued to insured if the cargo had reached Montreal. But whether that coverage may for all purposes be correctly described as insurance of profits or not, it can stand on no different footing in the present case, for, like insurance of profits, it covers risk of loss not covered by the cargo policy; and the reasons which preclude the insurer of profits from participating, by way of subrogation, in the recovery of the insured for maritime torts causing loss of the cargo should exclude petitioner from participation here.

Had petitioner's policy been the usual one on cargo, but to the extent only that it was not covered by respondent's insurance, petitioner's liability would not have been the 31¼¢ a bushel which it paid, the difference between C. I. F. price and the stipulated market value at destination, but 12¾¢ a bushel, the difference between the value insured by respondent and sound value at port of shipment. To that extent petitioner and respondent would both have been insurers of cargo, entitled to share in the recovery of insured for its full loss, as the courts below permitted them to do. But petitioner's liability was for the larger amount; and so far as bound to pay in excess of the value at shipment, it insured against a risk for which there could be no recovery on the cargo policy, and for which the owner did and could make no recovery against wrongdoers for the destruction of the cargo. Petitioner may not be subrogated to a recovery for a loss against which it did not insure.

Brown v. *Merchants' Marine Insurance Co., supra,* on which petitioner relies, does not support its contention. In that case, a vessel having an actual value of $140,000 was insured by several time policies, in which it was valued at $75,000. There were also policies aggregating $12,200 on "disbursements and/or increased value". The vessel was sunk in collision and became a total loss, which the underwriters paid. As both vessels were at fault, the damage was divided; and the insured recovered, as net collision damages, after payment of expenses, less than the $75,000 value stated in the policies.

It was held that the insurers of increased value were entitled to share in the recovery pro rata with the other underwriters. But

the recovery was based upon the loss of the total value of the ship, which, in that case, was the subject *pro tanto* of the increased value insurance. Without regard to possible rights of priority, among the several underwriters, to the fund which all were entitled to claim by subrogation, the question there was different from that presented here, where the fund recovered was for a loss against which petitioner did not insure, and to which for that reason it may not be subrogated.

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.